TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

October Term, 1961

No. 481

ALBERT ANDREWS, PETITIONER,

v.

UNITED STATES

No. 484

ROBERT L. DONOVAN, PETITIONER,

v.

UNITED STATES

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

NO. 481—PETITION FOR CERTIORARI FILED APRIL 14, 1962.
NO. 484—PETITION FOR CERTIORARI FILED JUNE 13, 1962.
CERTIORARI GRANTED OCTOBER 8, 1962.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 491

ALBERT ANDREWS, PETITIONER,

vs.

UNITED STATES

No. 494

ROBERT L. DONOVAN, PETITIONER,

vs.

UNITED STATES

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Crim. No. C 145-191

Criminal Docket

Docket Entries

The United States

vs.

Robert L. Donovan, Albert Andrews, Hyman Cohen

Violation

Title 18, Secs 2114 and 371 USC.

Unlawfully assaulting with intent to rob, steal and purloin mail matter, money etc., a post office employee and jeopardized said employee by use of a dangerous weapon and conspiracy to assault post office employee with intent to rob.

Three counts.

Date	Name	Amt. Rec'd.	Disb.
1- 6-60	A. Andrews	$ 5.00	
1- 8-60	Pd. U. S. Tsy		$ 5.00
Date	**Cash Acct. Deft.**	**Rec'd.**	**Disb.**
1- 7-55	L. P. H.	$10.00	
1-11-55	Pd. U. S. Treas.		$10.00
1-10-55	L. P. H.	$ 5.00	
1-11-55	Pd. U. S. Treas.		$ 5.00
5-29-57	J. W. Freedman for Donovan and Andrews	$10.00	
6- 4-57	Pd. U. S. Treas.		$10.00
9- 3-58	D. H. Gsreenberg	$ 5.00	
9- 5-58	Pd. U. S. Treas.		$ 5.00

Date	Proceedings
10-8-54	Filed indictment.
10-14-54	All three defendants plead not guilty. Bail $50,000. for each defendant. Remanded. Ryan, J.
11-3-54	Filed affdts, by Leo Healy and Murray Cutler for adjournment of trial.

Date	Proceedings
12-27-54	Trial begun as to all three defendants before Hon. L. E. Walsh, J.
12-28-54	Trial cont'd.
12-29-54	Trial cont'd.
12-30-54	Trial cont'd.
12-31-54	Trial cont'd and concluded. Jury verdict. Guilty as to all three defendants on all three counts. Walsh, J.
12-31-54	Filed Judgments as to each deft. Twenty Five Years on count two; Five Years on count 3. Sentence on counts 2 & 3 to run concurrently at a place of confinement to be designated by the Atty Genl. Remanded. Sentence continued on other side.
[fol. 2]	
12-31-54	Sentences continued—No sentence imposed on count one because count one merges into sentence on count two upon conviction on counts one and two. Walsh, J.
12-31-54	Issued commitments and copies as to each defendant.
1-10-55	Filed notice of appeal as to Robert Donovan. Copy mailed to Warden, U S Det. Hdqtrs NYC 1-10-55. (FEH) Clerk's fee $5.00.
1-7-55	Filed notice of appeal as to Hyman Cohen. (JWF) Clerk's fee $5.00.
1-7-55	Filed notice of appeal as to Albert Andrews. (LH) Clerk's fee $5.00.
1-13-55	Filed election by Robert Donovan not to commence service of sentence 1-12-55.
1-14-55	Filed commitment and marshal's return. Deft. Albert Andrews delivered to Det Hdq. NYC on Dec. 31, 1954 for service (sentence) or for transfer to another institution.
1-14-55	Filed commitment and marshal's return. Deft. Robert L. Donovan delivered to Det Hdq. NYC on Dec 31, 1954 for service of sentence or for transfer to another institution.

Date	Proceedings
1-14-55	Filed Remand for Hyman Cohen, Oct 14, 1954. I. R. Kaufman, J.
1-14-55	Filed election by Albert Andrews not to commence service of sentence Jan 13, 1955.
1-14-55	Filed Remand for Albert Andrews, October 14, 1955. I. R. Kaufman, Jr.
1-14-55	Filed Remand for Robert L. Donovan, October 14, 1955. I. R. Kaufman, J.
2-14-55	Filed commitment and entered marshal's return. Deft. Hyman Cohen delivered to Fed. Det. Hdtrs NYC 2-10-55 for delivery by prison bus to Federal Institution.
3-10-55	Filed order that Robert Donovan, Deft be allowed prosecute his appeal without being required to prepay fees or costs or give security, because of his poverty and that the deft be furnished a stenographic transcript of trial minutes, at the expense of the Government. Walsh, J.
4-15-55	Filed election by Robert L. Donovan dated 4-13-55 to resume service of sentence.
5-13-55	Filed Transcript of record of proceedings, dated Dec. 27, 27, 29, 30 & 31, 1954.
6-2-55	Filed complaint dated 9-11-54, commrs. commitments and notices of appearance, Leo Healy & Murray Cutler, 16 Courts St. Bklyn for deft. Andrews; Frank E. Healey, 1776 Bway for deft. Donovan and Emanuel Tannenbaum, 51 Chambers St. NYC for Hyman Cohen.
10-25-55	Filed Transcript of record of proceedings, dated 10-14-54.
[fol. 3]	
11-29-55	Filed letter dated 11-21-55 from deft. Albert Andrews requesting names of trial jurors. Memo endorsed—11-28-55 Application denied. No basis shown for any investigation of any juror. Walsh, J.
3-6-56	Filed election by Albert Andrews to resume service of sentence. 3-5-56.
7-23-56	Filed Transcript of record of proceedings, dated 12-30-54.

Date	Proceedings
9-28-56	Filed notice, the certified record on appeal to USCA.
12-31-56	Filed Transcript of record of proceedings, dated 12-30-54.
1-10-57	Filed notice that the supplemental to record on appeal has been certified to the US Ca on 1-10-57.
3-25-57	Filed a true copy of order and opinion received from the US CA affirming the Judgments of the U.S. Dist. Court and action remanded for re-sentencing on Count 2 in accordance with the opinion of this Court.
3-29-57	Filed notice of settlement and order on Judgment—Judgment of US CA made justment of this Court. Clancy, J.
4-25-57	Filed affidavit of Adelbert C. Matthews, Jr. for a Writ of Habeas Corpus Ad Prosequendum for Robert L. Donovan. Iss. Writ. Ret. 5-15-57.
4-25-57	Filed affidavit of Adelbert C. Matthews, Jr. for a Writ of Habeas Corpus Ad Prosequendum for Hyman Cohen. Iss. Writ. Ret. 5-15-57.
4-25-57	Filed affidavit of Adelbert C. Matthews, Jr. for a Writ of Habeas Corpus Ad Prosequendum for Albert Andrews. Iss. Writ. Ret. 5-15-57.
5-20-57	All three defendants are produced in court on writs of habeas corpus ad prosequendum for "resentencing" on count two pursuant to judgment of U.S.C.A. Sentences of Donovan and Andrews to remain unchanged. Orders to be submitted. As to the defendant Cohen the Execution of Sentence on count two is suspended. Defendant placed on probation for five (5) years, to begin upon termination of sentence on count three, subject to the standing probation order of this court. Order to be submitted. Walsh, J.
5-28-57	Filed notice of motion by Robert L. Donovan for leave to appeal in forma pauperis. Motion granted 5-27-57. Walsh, J.
5-28-57	Filed notice of appeal by Robert L. Donovan.

Date	Proceedings
5-29-57	Filed Order resentencing Hyman Cohen on count two. Execution of sentence on ct 2 suspended. Probation for 5 yrs to begin upon termination of sentence of 5 yrs he is presently serving on count 3, subject to the standing probation order of this Court. Walsh, J.
5-29-57	Filed Order that sentence of Albert Andrews dated 12-31-54 remain unchanged. Walsh, J.
[fol. 4]	
5-29-57	Filed Order that sentence of Robert L. Donovan dated 12-31-54 remain unchanged. Walsh, J.
5-29-57	Issued certified copies of orders as to three defendants filed 5-29-57 to U. S. marshal.
5-29-57	Filed notice of appeal by Robert L. Donovan. Clerk's fee $5.00.
5-29-57	Filed notice of appeal by Albert Andrews. Clerk's fee $5.00.
6-5-57	Filed writ of habeas corpus ad prosequendum dated 4-24-57 for Hyman Cohen and entered Marshal's execution dated 4-30-57. Writ satisfied on 5-20-57. Walsh, J.
6-5-57	Filed writ of habeas corpus ad prosequendum dated 4-24-57 for Robert L. Donovan and entered Marshal's execution dated 5-5-57. Writ satisfied on 5-20-57. Walsh, J.
6-5-57	Filed writ of habeas corpus ad prosequendum dated 4-24-57 for Albert Andrews and entered Marshal's execution dated 5-11-57. Writ satisfied on 5-20-57. Walsh, J.
6-5-57	Filed a true copy of order dated 5-29-57 as to Albert Andrews. Ordered, that the judgment dated 12-31-54, entered herein, remain unchanged and in full force and effect. Walsh, J.
6-5-57	Filed a true copy of order dated 5-29-57 as to Robert L. Donovan. Ordered, that the judgment dated 12-31-54, entered herein, remain unchanged and in full force and effect. Walsh, J.

Date	Proceedings
6-5-57	Filed a true copy of order dated 5-29-57 as to Hyman Cohen. Ordered, that the execution of the sentence of 25 years on count 2 be and hereby is suspended and defendant placed on probation for a period of 5 years, to begin upon termination of sentence of 5 years he is presently serving on count 3, subject to the standing probation order of the Court. Walsh, J.
6-13-57	Filed Transcript of record of proceedings, dated May 15 & 20, 1957.
7-3-57	Filed notice of motion by Robert Donovan for an order granting the petition to elect not to commence service pursuant to Rule 38, and to have petitioner transferred to the Second Circuit wherein he can more properly prosecute his appeal. 7-22-57 Motion denied without prejudice to renew. Dimock, J.
7-5-57	Filed notice of motion by Albert Andrews for an order granting the petition to elect not to commence service pursuant to Rule 38, and to have petitioner transferred to the Second Circuit wherein he can more properly prosecute his appeal. 7-22-57 Motion denied without prejudice to renew. Dimock, J.
7-11-57	Filed affdt. and notice of motion by Robert Donovan and Albert Andrews for an order for an enlargement of 90 days within which to perfect and docket appeal to US CA. 7-22-57 Motion argued. Motion granted. Deft. allowed 60 days to perfect and docket appeal. Dimock, J.
7-22-57	Filed affidavit of Adelbert C. Matthews, Jr. in opposition to Defendants' motions.
9-19-57	Filed notice that the record on appeal had been certified to the US CA on 9-19-57.
4-1-58	Filed true copy of judgment and opinion judgment of the U.S.C.A. Judgment of the Dist. Court as to defts. Donovan, and Andrews, affirmed.

Date	Proceedings
4-11-58	Filed notice of settlement and order on judgment —Judgment of US CA as to Robert L. Donovan and Albert Andrews made judgment of this Court. Cashin, J.
[fol. 5]	
7-23-58	Filed notice of motion to correct or reduce the sentence as to deft Albert Andrews.
8-25-58	Filed Opinion # 24557—Palmieri, J. Defendant's motion to reduce or correct sentence is denied in all respects. It is so ordered. Mailed notice.
9-3-58	Filed notice of appeal as to Albert Andrews. Clerk's fee $5.00.
9-5-58	Filed letter of deft. Albert Andrews dated 8-31-58 to Charlson, Clerk, Re Notice of appeal.
9-15-58	Filed affidavit and petition for leave to appeal in forma pauperis as to deft. Albert Andrews. 9-22-58 Respectfully referred to Judge Palmieri. Kaufman, J.
10-8-58	Filed Transcript of record of proceedings, dated 8-4-58.
10-8-58	Filed notice—supplemental record on appeal certified to the U.S.C.A. as to deft. Albert Andrews.
10-10-58	Filed Opinion # 24619 by Palmieri, J—Defendant's (Andrews) application for permission to prosecute appeal in forma pauperis granted. Time for filing the record on appeal and docketing proceeding is extended to Oct. 28, 1958. It is so ordered.
10-10-58	Filed affidavit of Asst. U.S. Attorney Gordon in opposition to Andrews' motion to proceed in forma pauperis.
10-14-58	Filed notice—supplemental record on appeal certified to the U.S.C.A. as to deft Albert Andrews.
3-10-59	Filed true copy of judgment and opinion of the U.S.C.A. that the order of the District Court hereby is affirmed. Daniel Fusaro, Clerk. (deft Albert Andrews)

Date	Proceedings
3-20-59	Filed notice of settlement and order on judgment of the U.S.C.A. that the judgment is made the judgment of this Court, as to deft Albert Andrews. Noonan, J.
6-10-59	Albert Andrews—Filed Petition, Exhibits and Notice of Motion pursuant to Rule 60(b) of the Fed. Rules of Civil Procedure for an order granting relief from a denial of defts motion for correction or reduction of sentence under Rule 35, F.R.C.P. 6-22-59 Respectfully referred to Judge Palmieri. Dimock, J.
6-22-59	Filed affidavit of George I. Gordon, Esq., Ass't U.S. Attorney in opposition to defendants' motion for relief from order denying motion for reduction of sentence.
6-25-59	Memo endorsed on motion filed 6-10-59 on behalf of defendant Andrews. "This motion, improperly brought under Fed.R.Civ.P.60(b) Civ.P.1, is treated as a motion under Fed. R.Crim.P. 35 and 28 USC Sec 2255. • • • The motion is in all respects denied. So Ordered." Palmieri, J. (notice mailed)
6-30-59	Filed petition of Defendant Andrews dated 6-24-59 requesting that his motion filed 6-10-59 be entertained under Sec. 2255. Memo. endorsed —No further action on the part of the Court is required since relief requested has been afforded the defendant. Palmieri, J.
[fol. 6]	
11-2-59	Albert Andrews—filed affidavit and notice of motion to set aside and vacate sentence pursuant to Title 28, Sec. 2255 USC.—12-16-59—Argued—Decision reserved. Murphy, J.
12-29-59	Albert Andrews—Filed affidavit of Herbert Bruce Greene, Ass't U.S. Atty in opposition to motion pursuant to T. 28, U.S.C., Sec. 2255.
12-29-59	Albert Andrews—Filed Memorandum # 25613 —Murphy, D.J.—"Motion pursuant to Sec. 2255, 28 U.S.C., denied. • • • This is an order. No settlement is necessary. Murphy, J." (See Memorandum). (mailed notice)

Date	Proceedings
1-6-60	Albert Andrews—Filed Notice of Appeal from denial of motion under Title 28, Sec. 2255. Clerk's fee $5.00.
1-15-60	Albert Andrews—Filed Affidavit & Notice of Motion to appeal in forma pauperis. Motion to appeal in formr pauperis referred to Judge Murphy on 1-25-60. Weinfeld, J.
1-28-60	Albert Andrews—Filed Affidavit of Asst. U.S. Atty H. B. Greene in opposition to motion for permission to appeal in Forma Pauperis. dated 1-25-60.
1-28-60	Albert Andrews—Filed Memorandum—Murphy, D.J. # 25699—"Application for an order to appeal in forma pauperis is denied . * * * See our memorandum dated 12-29-59. This is an order. No settlement is necessary." (See Memorandum) (Def't notified).
2-10-60	Albert Andrews—Filed notice that record has been certified to the U.S.C.S.
4-26-60	Albert Andrews—Filed True Copy of Judgment of U.S.C.A.—Ordered that the motion for leave to proceed in forma pauperis be and it hereby is denied. Further ordered that the appeal from the order of U.S.D.C. for the SDNY be and it hereby is dismissed. A. Daniel Fusaro, Clerk.
6-16-60	Albert Andrews—Filed notice of settlement & Order on judgment that the judgment of the U.S.C.A. is made the judgment of this Court. Kaufman, J. Judgment entered 6-16-60—Herbert A. Charlson, Clerk. (notified)
4-17-61	Robert L. Donovan—Filed deft's "Motion to vacate illegal sentence", pursuant to Rule 32(a) and Rule 35, Federal Rules of Criminal Procedure and deft's request "that the Court order the Clerk to prepare and file a Notice of Appeal should the Court deny the motion under Rule 35 * * * ".
4-26-61	Robert L. Donovan—Filed supplement to Motion filed under Rule 35, Fed. Rules of C.P.

Date	Proceedings
6-6-61	Robert L. Donovan—Motion to vacate illegal sentence submitted—Decision reserved. Murphy, J.
6-19-61	Robert Donovan—Filed Opinion # 27006 by Murphy, J.—"Deft's motion is granted and it is ordered that he be returned to this district for resentencing. * * * This is an order. No settlement is necessary." Murphy, J. Deft. notified.
6-19-61	Robert Donovan—Filed letter of deft. to Chief Judge, dated 5-17-61. Filed Affidavit of Deft. in reply to affidavit in Opposition, sworn to 6-8-61. Filed Affidavit of A. I. Rosett, asst U.S. Atty in opposition to motion of deft. for resentencing.
6-29-61	Robert L. Donovan—Filed Affidavit and Order that the provision of the order of 6-16-61 requiring the return of the deft. to the Southern District of New York for resentencing be and the same is stayed up to and including July 17, 1961. Murphy, J.
[fol. 7]	
7-14-61	Filed Notice of Appeal by United States Attorney from order of Judge Murphy granting defendant Donovan's motion under Rule # 35.
7-19-61	Albert Andrews—Filed letter to Judge Murphy, from def't, dated 6-25-61 requesting that the judgment be vacated. Memorandum endorsed: "7-18-61—Motion granted. Let the defendant be resentenced. Murphy, D.J." (Def't notified).
7-19-61	Albert Andrews—Filed Affidavit of Arthur I. Rosett, Ass't U.S. Atty, dated 6-30-61, in opposition to letter of def't to vacate sentence under Title 28, Sec. 2255, U.S.C.
7-31-61	Albert Andrews—Filed Government's Notice of Appeal from Order of Judge Murphy dated 7-18-61 granting defendant Andrews' motion under Title 28, Sec. 2255.

Date	Proceedings
8-1-61	Albert Andrews—Filed affidavit and notice of motion of Arthur I. Rosett, Asst. U.S. Atty. for a stay of the order of Judge Murphy requiring the return of the deft. Andrews to the Southern District of New York for re-sentencing. 8-7-61—"Respectfully referred to Judge Murphy". Herlands, J.
8-1-61	Robert L. Donovan—Filed affidavit and notice of motion of Arthur I. Rosett, Asst. U.S. Atty. for a stay of the order of Judge Murphy requiring the return of the deft. Donovan to the Southern District of New York for re-sentencing. 8-7-61—"Respectfully referred to Judge Murphy". Herlands, J.
8-8-61	Robert L. Donovan—Memo endorsed on motion papers filed 8-1-61—"Motion granted." (deft. notified) Murphy, J.
8-8-61	Albert Andrews—Memo endorsed on motion papers filed 8-1-61—"Motion granted." (deft. notified) Murphy, J.
8-17-61	Robert L. Donovan—Memo endorsed on reply affidavit of deft., sworn to 8-14-61—"This reply has been read. Please file." Murphy, J.
8-18-61	Robert L. Donovan—Field reply affidavit of deft., sworn to 8-14-61—re: resentencing.
8-21-61	Robert L. Donovan—Filed Letter of Defts' addressed to Judge Murphy, dated 8-17-61. Endorsement—"To The Clerk. Please File" Murphy, J. (signed 8-21-61)

[fol. 8] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

No. C 145-191

UNITED STATES OF AMERICA,

v.

ROBERT L. DONOVAN, ALBERT ANDREWS, and HYMAN COHEN, Defendants

INDICTMENT—Filed October 8, 1954

The Grand Jury charges:

1. On or about the 10th day of September, 1954, in the Southern District of New York, Robert L. Donovan, Albert Andrews and Hyman Cohen, the defendants herein, unlawfully, wilfully and knowingly did assault with intent to rob, steal and purloin mail matter, money and property of the United States, from a United States Post Office Department employee, to wit, Ezio G. Fragale, who had lawful charge, control and custody of said mail matter, money and property of the United States at the time of said assault.

(Title 18, United States Code, Section 2114)

Count Two

The Grand Jury further charges:

1. On or about the 10th day of September, 1954, in the Southern District of New York, Robert L. Donovan, Albert Andrews and Hyman Cohen, the defendants herein, unlawfully, wilfully and knowingly did assault with intent to rob, steal and purloin mail matter, money and property of the United States, from a United States Post Office Department employee, to wit, Ezio G. Fragale, who had lawful charge, control and custody of said mail matter, money and property of the United States at the time of said assault. [fol. 9] 2. In attempting to effect such robbery, Robert L. Donovan, Albert Andrews, and Hyman Cohen, the de-

fendants herein, did put the life of a United States Post Office Department employee, to wit, Ezio G. Fragale, in jeopardy by the use of a dangerous weapon, to wit, a loaded 38 Smith and Wesson Special revolver.

(Title 18, United States Code, Section 2114).

Count Three

The Grand Jury further charges:

1. On or about the 1st day of August, 1954, and continuously thereafter up to and including the 10th day of September, 1954, in the Southern District District of New York, Robert L. Donovan, Albert Andrews, and Hyman Cohen, the defendants herein, unlawfully, wilfully and knowingly combined, conspired, confederated and agreed, together and with each other, and with divers other persons to the Grand Jury unknown, to commit offenses against the United States, to wit, to violate the United States Code, Title 18, Section 2114.

2. It was a part of said conspiracy that the said defendants would unlawfully, wilfully and knowingly assault an employee of the United States Post Office Department while said employee had lawful charge, control and custody of mail matter and money and other property of the United States, with intent to rob, steal and purloin such mail matter, money and other property of the United States.

Overt Acts

1. In pursuance of the said conspiracy and to effect the objects thereof, on or about the 10th day of September, 1954, in the Southern District of New York, Albert Andrews and Hyman Cohen had a conversation.

[fol. 10] 2. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 10th day of September, 1954, in the Southern District of New York, Robert L. Donovan and Albert Andrews had a conversation.

3. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 10th day of September, 1954, in the Southern District of New York, Robert L. Donovan held a loaded 38 Smith and Wesson Special

revolver on a driver of a United States Post Office Department mail truck.

4. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 10th day of September, 1954, in the Southern District of New York, Robert L. Donovan wore the uniform of a United States Post Office Department employee.

(Title 18, Section 371, United States Code).

J. Edward Lumbard, United States Attorney.

Martin Kennedy, Foreman.

[fol. 11] C 145-191

U. S. District Court

The United States of America

vs.

Robert L. Donovan, Albert Andrews, and Hyman Cohen, Defendants

Indictment

Assault of a person in control of mail matter with intent to rob said mail and conspiracy so to do, in violation of Title 18, United States Code, Sections 371 and 2114.

J. Edward Lumbard, United States Attorney.

A True Bill

(Illegible), foreman.

October 14, 1954.

All three defendants Pleads not guilty—Bail $50,000. for each defendant. Remanded.

Before: Hon. V. L. Leibell, D. J.—Ryan, J.

November 5, 1954—Case called and Set down for Trial for November 22, 1954, 10:30 A.M.

December 27, 1954—Trial begun as to all three defendants. Before Hon. L. E. Walsh, J.

December 28, 1954—Trial con't.

December 29, 1954—Trial con't.

December 30, 1954—Trial con't.

December 31, 1954—Trial con't. and concluded. Jury's verdict of guilty on three counts for all three defendants. Sentence 25 yrs on ct. 2 and 5 yrs. on ct 3 for each deft. Walsh, J. Sentence to run concurrently.

May 20, 1957.

All three defendants are produced in Court on writs for "resentencing" on count 2 persuant to judgment of USCA—

Sentences of Donovan and Andrews to remain unchanged —Orders to be submitted.

Execution of sentence on count two as to defendant Cohen is suspended. Deft. placed on probation for 5 years to begin upon termination of sentence on count 3—order to be submitted.

Subject to the Standing Probation Order of this Court.

/s Walsh, J.

[fol. 12] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

No. C 145-191

UNITED STATES OF AMERICA,

v.

ROBERT L. DONOVAN

JUDGMENT AND COMMITMENT—December 31, 1954

On this 31st day of December, 1954, 19— came the attorney for the government and the defendant appeared in person and [1] by counsel.

It is Adjudged that the defendant has been convicted upon his plea of [2] not guilty and a verdict of guilty by a jury of the offense of unlawfully, wilfully and knowingly did assault with intent to rob, steal and purloin mail matter, money and property of the United States from a Post Office Department Employee, who had lawful charge, control and custody of said mail matter, money and property of the United States at the time of said assault, and in attempting to effect such robbery, did put the life of said employee in jeopardy by the use of a dangerous weapon, to wit, a loaded 38 Smith and Wesson Special revolver and conspiracy so to do as charged [3] T 18 Sec. 2114 and 371 USC and the court having asked the defendant whether he has anything to say why judgment should not be pro-

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[1] Insert "by counsel" or "without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel."

[2] Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be.

[3] Insert "in count(s) number " if required.

nounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is Adjudged that the defendant is guilty as charged and convicted.

It is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of [4] Twenty Five (25) Years on count two. Five Years (5) on count three.

Sentence on counts 2 & 3 to run concurrently.

No sentence imposed on count one, because count one merges into sentence on count two upon conviction on counts one and two.

It is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Lawrence E. Walsh, United States District Judge.

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[4] Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding or unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law.

[fol. 13] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

No. C 145-191

UNITED STATES OF AMERICA,

v.

ALBERT ANDREWS

JUDGMENT AND COMMITMENT—December 31, 1954

On this 31st day of December, 1954, came the attorney for the government and the defendant appeared in person and [1] by counsel.

It is Adjudged that the defendant has been convicted upon his plea of [2] not guilty and a verdict of guilty by a jury of the offense of unlawfully, wilfully and knowingly did assault with intent to rob, steal and purloin mail matter, money and property of the United States from a Post Office Department Employee, who had lawful charge, control and custody of said mail matter, money and property of the United States at the time of said assault, and in attempting to effect such robbery, did put the life of said employee in jeopardy by the use of a dangerous weapon, to wit, a loaded 38 Smith and Wesson Special revolver and conspiracy so to do as charged [3] T 18 Sec. 2114 and 371 USC and the court having asked the defendant whether he has anything to say why judgment should not be pro-

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nounced, and no sufficient cause to the contrary being shown or appearing to the Court,

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Sentence on counts 2 & 3 to run concurently.

No sentence imposed on count one because count one merges into sentence on count two upon conviction on counts one and two.

It is Odered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Lawrence E. Walsh, United States District Judge.

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[4] Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding or unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law.

[fol. 14] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

C 145-191

UNITED STATES OF AMERICA,

vs.

ROBERT L. DONOVAN, ALBERT ANDREWS and HYMAN COHEN,
Defendants.

Before: Hon. Lawrence E. Walsh, District Judge.

Transcript of Proceedings, May 15, 1957

APPEARANCES:

Paul W. Williams, Esq., United States Attorney, for the Government; By: Adelbert C. Matthews, Jr., Esq., Assistant United States Attorney.

Jacob W. Friedman, Esq., Attorney for Defendants Albert Andrews and Hyman Cohen.

Frank A. Healey, Esq., Attorney for Defendant Robert L. Donovan.

[fol. 15] COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Friedman: If your Honor please, your Honor will recall that this matter was before your Honor sometime ago. I am counsel for all three defendants. I think briefs were requested. I have been engaged in court constantly and I haven't had time to prepare it. The questions are rather difficult, as to the extent of your Honor's power.

Would your Honor be kind enough to put this sentence over one week? Your Honor originally set it for 2:30 today.

The Court: Has the Government any objection?

Mr. Matthews: No serious objection. I do not know that we need a week on it. They are here on writs. We can continue the writs.

Mr. Friedman: I cannot be ready before a week, your Honor, as I have a court engagement and I am leaving town tomorrow for three days. But I want to get a brief in to your Honor in time to present the views of the defendants

as to the powers of your Honor. There seems to be some question as to the extent of your Honor's power.

The Court: One thing I cannot understand is that this thing has been here almost sixty days.

Mr. Matthews: Yes.

[fol. 16] The Court: This date has been fixed for a long time. Frankly, I do not want this resentence procedure used to extend a visit to New York.

Mr. Friedman: That is not the purpose, your Honor, I can assure your Honor. I just want to make sure that I get my views on the subject of resentence before your Honor and the law on it.

The Court: I will give you until Monday afternoon at 2.30.

(Adjourned to May 20, 1957, at 2.30 p.m.)

[fol. 17] New York, May 20, 1957, (2:30 p. m.)

The Clerk: United States vs. Donovan, Andrews and Cohen.

Mr. Matthews: Ready.

Mr. Friedman: Ready.

The Court: Are the defendants present?

Mr. Friedman: I understand that they are on their way up, your Honor.

The Court: All right.

Mr. Friedman: I am sorry, your Honor, but I did not have the opportunity, as I was away for a few days, to prepare a memorandum of law.

The Court: Yes.

STATEMENT BY MR. FRIEDMAN

Mr. Friedman: There is some question raised in this case with regard to the lesser offense being merged into the later offense and the separability of the two, and it does seem to me that there is a difference of opinion in the reported cases as to whether the defense involving an em-[fol. 18] ployee of the Government merges in the greater offense of robbing under circumstances as to put his life in jeopardy.

Now, there are a number of cases, one of which is a case in the Supreme Court of the United States, which held that they were separate offenses, and including several cases in the Tenth Circuit and one in the Eighth Circuit. And it was pointed out in one of those cases, Schultz v. Zerbst, 73 Fed. 2d, 668, that the evidence which sustains the offense charged in the first count—and it happened in this particular case that the offenses were numbered the same way as they are in the case at bar, namely, assault with intent to rob, would be wholly insufficient in support of evidence of robbery effected by putting lives of persons in charge of mail matter in jeopardy as charged in the second count of the indictment, as each required proof of a different fact or element, and the Court there said as follows:

That Counts 1 and 2 charge different offenses, they were separate and distinct, and for the conviction separate penalties might be inflicted upon him, that is, the defendant, in that particular case.

Now, there is one other point that I want to call to your [fol. 19] Honor's attention, and that is that the United States Court of Appeals in the case at bar pointed out as as to the statute apparently making the 25-year residence mandatory, that under that statute the Court has the power of not merely to impose the sentence but the Court likewise has the power to suspend the imposition of the sentence, and that is not mere verbiage in the statute. The two words are separately stated.

And it was held in Riggs-vs. United States, a 4th Circuit case, 14 Fed. 2d, page 5, and Driver v. United States, 232 Fed. 2d, 418, a rather recent case, that a proper construction of the probation statute empowers the Court if in its discretion to suspend the imposition of sentence, that the Court is not constrained or obliged immediately upon a conviction to impose sentence at all. And there is a sharp distinction in the cases on probation as to the time of suspending the execution of the sentence as the statute empowers the Court to do for a period of five years, and the power to suspend the imposition of sentence if the Court feels that some good would be served thereby.

Our point is, apart from the legal difficulties incident [fol. 20] to the imposition of sentence, the United States Court of Appeals remanded the case for resentence under

Count 2, and it could be argued that under those circumstances your Honor does not have any jurisdiction to impose sentence on Count 1.

Whether that supposition in there can add much, I am not prepared to say, but I do want to point this out, though: Factually, your Honor, that the defendants in this case were arrested on September 10, 1954, which was a period of over two years and eight months ago. At no time during that period were any of the defendants out on bail, so that each defendant has now served a period of two years and eight months considering the benefits to be taken into consideration with the allowances of the possibility of the defendants being admitted to parole after the service of one-third of the sentence, which may be viewed as the equivalent of a sentence of over eight years, and I would respectfully ask your Honor to give that such consideration.

With regard to the prospective cases, the District Attorney, I understand, your Honor has comprehensive reports concerning their families and their background.

[fol. 21] I do want to point out or remind your Honor that at the time the sentence was imposed in this case, which was in December of 1954, that your Honor will recall as to the circumstances at that time, but since that time because of the execution of the appeal and limited means of the family I was engaged to represent all of the defendants. In fact, I argued on behalf of all of them in the United States Court of Appeals. The defendants are differently situated, but your Honor will remember this, no doubt, that when the time came to impose sentence your Honor was under the impression that your Honor had to follow a mandatory provision of the Statute, or what appeared to be a mandatory provision under the Statute apart from other statutes, and your Honor then said that if you could be shown otherwise by counsel your Honor would be very happy to consider it or to entertain it.

For some reason, at that time I did not or could not, that is, did not know anything about the law, not that I know much about it now, but at that time I knew less, and was not able to call any opinion to your Honor's attention which would cause your Honor to take a different view, [fol. 22] but your Honor did give the distinct impression in December, 1954, that had your Honor been fully satisfied

as to the powers of the Court, your Honor would have done otherwise.

Well, at any rate, your Honor felt you could not, and you, therefore, imposed a 25-year sentence. Finally we got the ruling of the higher court that your Honor does have the power to suspend either the imposition or the execution of the sentence as your Honor sees fit with respect to the second count of the indictment.

The 5-year sentence as imposed on the conspiracy or third count of the indictment remains unaffected.

The Court: I think I have got your point on the law.

Mr. Matthews: May I say a word, your Honor?

The Court: Yes.

STATEMENTS BY MR. MATTHEWS

Mr. Matthews: I would like to add a few things to that, your Honor. I have submitted a memorandum of law which I think sets forth the Government's view, in other words, which is this, it is not a question of point of view but what the Legislature has done that the Government [fol. 23] respectfully states that your jurisdiction is now limited to either giving the defendant a suspended sentence on Count 2, or a sentence of 25 years on Count 2, and there is no question now as to resentencing on Count 3. I think that is pretty clear by the opinion of the Court of Appeals in this case, and I set out the pertinent part in the Government's brief.

I have also requisitioned the file in the case, which is the judgment of conviction, certified copy of the judgment of conviction of the Court of Appeals, and also the order on judgment, and I have inserted therein papers which indicate those two documents. They both specifically state that the case is remanded for resentencing on Count 2 without any reference to either Count 1 or Count 3.

I would just like to make reference to a couple of cases cited by Mr. Friedman, not having the memorandum heretofore, and just having had a chance to look at it, I think he cited three cases for the proposition that there is no merger as respects Counts 1, and 2. One of those cases are Schultz v. Zerbst, 73 Fed. 2d, 668, and the other is Sansone v. Zerbst, 73 Fed. 2d, 670.

[fol. 24] Both of those cases were cited in the Government's brief to the Court of Appeals, and they do stand for the proposition for which Mr. Friedman speaks of. However, the Government also cited the cases of Kosner v. United States and Brooks v. United States for the contrary proposition that there is a merger as respects Counts 1 and 2.

It is, of course, significant that the Court of Appeals in writing their opinion stated that there was a merger of the lesser offense to the more aggravated form of offense and cited the Kosner case and the Brooks case and did not cite the Schultz and Sansone cases. In fact, if my memory serves me correctly, one of the cases refers to the Schultz case and referred to the rationale of it.

So I respectfully submit to your Honor that your power or your jurisdiction is now limited to a resentencing on just Count 2.

The Court: Well, I think that this is about as far as we need go now without the defendants being present. Therefore we will take a short recess on this matter and go ahead with the Hudson & Manhattan until the defendants are brought up here and are present.

[fol. 25] (Short recess)

The Clerk: United States v. Donovan and others.

The Court: Are all of the defendants present now?

The Clerk: Yes, sir.

The Court: Is there anything you want to say now?

Mr. Matthews: Yes, your Honor. As your Honor is aware, this involves the resentencing of the three defendants, Donovan, Andrews and Cohen, and as your Honor was the trial judge in this matter I don't think it is necessary to go into detail as to the facts except in a very, very general way.

As you will recall, there was a holdup with a revolver of the United States mail truck. The actual attempted holdup with the revolver was performed by Donovan. The person who planned and helped execute the holdup was the defendant Andrews, and Mr. Cohen's part in it was that he was an employee of the post office at that time, and he informed Andrews, who in turn informed Donovan as to what truck they though held the money and registered mail.

And, of course, he was aware that a holdup was to take place and it was to be an armed robbery.

[fol. 26] The Government does not have much information on the background of these individual defendants, your Honor, but I notice that you have a presentence report. However, if you want any additional information I will be glad to attempt to supply it. None of them have a prior record; that is, I mean Cohen does not have a prior record; Andrews does not have a prior record, but Donovan has an extensive prior record, and if you wish I will read off what I have on that.

The Court: No, I don't think it is necessary.

Mr. Matthews: That is about all the Government would say at this time.

Mr. Friedman: If your Honor please, Mr. Frank Healey is now present and he will also say something on behalf of the defendant Donovan, and I will address a few remarks to your Honor with respect to the defendant Cohen and the defendant Andrews.

The Court: All right.

Mr. Friedman: As your Honor knows, he was a post office employee and prior to that he was a butcher by occupation. I think his record has been excellent. We know he has taken courses in dermatology and bacteriology. He [fol. 27] also conducted a school where he taught foreign persons the barbering trade and he is in a position where if he could have his liberty he could resume that occupation of being a barber.

He has a family which stands solidly behind him in this matter. His father there and his brothers are in court right now.

Your Honor will recall that there was some incident involving some other woman which is now a thing of the past. His wife is devoted to him. She is ready if he regains his liberty to resume living with him, and taking one thing with another I think that in the interest of justice he is entitled to the most extreme leniency that the Court can give him under the circumstances.

STATEMENT IN BEHALF OF ALBERT ANDREWS BY MR. FRIEDMAN

With regard to the defendant Andrews, your Honor, he has a good background. I think he is 29 years old this month. He was 26 years old when he was arrested and he has no prior criminal record. He is a high school graduate, has some college education. His family has backed him also and his sister and has constantly hounded me to aid her brother on the appeal and she is giving up her own earnings and sacrificing all of her time and efforts in his behalf.

[fol. 28] As your Honor knows in cases of this kind the real sufferers are the relatives and family almost to the same degree as the prisoners themselves.

The United States Court of Appeals in its opinion, and in addition to the things that were included in the discussion that we had before, they had this to say in its opinion, or summed it up in this fashion:

They used these two expressions, and they said that your Honor was given a choice between the possible inadequate sentence of five years and the possible excessive sentence of 25 years, which your Honor felt was mandatory at the time of the imposition of sentence.

I say to your Honor in accordance with the modern criminology practice the best possible sentence for any defendant is the least sentence that is consonant with justice and fairness, and if one sentence is possibly inadequate and the other sentence is possibly excessive, I think, your Honor, if that is the choice which your Honor is confronted with under the law, that your Honor should incline toward the sentence which is possibly inadequate.

[fol. 29] And, as I pointed out before, considering the time already served, that adds up to the equivalent of eight years when you consider a man is given one-third off of the sentencing time because of good behavior and the like, it is equivalent to an 8-year sentence.

The situation of Andrews is further complicated by the fact that the period of time lapsed, or the period of time which had elapsed before he elected to commence his sentence, so that he does not have the credit as he would have had in the event that he commenced his service of sentence immediately.

Taking all of those things into consideration I ask your Honor on behalf of these unfortunate men and their families to make due allowance and give them the most consideration that the law can permit you to do under the circumstances.

STATEMENT IN BEHALF OF ROBERT L. DONOVAN BY MR. HEALEY

Mr. Healey: If it please the Court, I was in the case from the very beginning as Mr. Friedman was. I am quite familair with all the facts and it was my opinion—and I say this in view of your Honor's statement at the end of the trial, that your Honor felt that if a lesser sentence would be given here—I don't know if your Honor had in mind a 5-year sentence—that your Honor probably would have given it.

[fol. 30] Now, this was an unsuccessful attempt by these men with regard to this matter, and with regard to what happened on the truck, Donovan, who, I understand, at one time wrote a letter saying that he was willing to take a lie detector test, that he never had the gun in his possession, to go ahead and commence the holdup of the truck and put the life of the driver in jeopardy, but be that as it may he was convicted.

Going into his background, he is 31 years of age. He has a criminal record, but I say this to your Honor, that we should look into the criminal record and find out why, and we see that he comes from a very poor family. He comes from a very poor family, lives on the east side, has a very meager education and has been fitted for no particular occupation, and ordinarily he is not the type of case that you have in these violations that your Honor customarily has before you. The family, Judge, today consists of four children and a wife, all minor children.

I might say this also, Judge, that I am here this afternoon pleading not only for Donovan, but for the four children, and his wife. They are in very poor circumstances, your Honor, on welfare. The wife is in court and the [fol. 31] circumstances of the family are such that they just about live off the neighborhood or the welfare and charity of others.

There is some hope and anxiety which has gone into this matter, Judge, because ever since they were convicted, and considering your Honor's statement after the sentence——

The Court: What statement is that now, Mr. Healey, that you are actually referring to? I believe you said that before.

Mr. Healey: That is the statement, your Honor, where your Honor said that if it could be shown that you had discretion with regard to the 25-year sentence, I believe it was on the last day of sentence.

The Court: That is what I told Mr. Friedman, that I would not hold up the sentence.

Mr. Healey: Correct. I say this, Judge, maybe erroneously we relied on it, but in any event we relied on it to some extent.

Donovan, of course, has been in jail ever since December 1954, together with the others, and the anxiety and the hope that they experienced, Judge, in coming before your Honor again on sentence I trust will be considered and taken into consideration by you.

[fol. 32] There must be some punishment, there is not any doubt in my mind about that. However, Donovan has a good record while in prison. He has sent some money home as best he can that he made in prison for the support of his family and his four children which range in ages from 4 to 6 years old. They live under poor circumstances and I respectfully submit, your Honor, that if your Honor does impose a sentence that it be a minimum sentence and that you suspend the 25 years and put him on probation for the period, as I am sure that that will be enough deterrent to prevent Donovan from ever going into danger again, and not only that but it would put him under the jurisdiction of this Court and your Honor would have the right to impose such a sentence if he comes before you, that is, impose the 25-year sentence again, and I respectfully submit that to your Honor.

Another thing is this, Judge:

At the time this case was tried I met Mr. Donovan's mother and, of course, she was in court throughout the entire proceeding and shortly thereafter the mother expe-

rienced a heart attack and died while Donovan was in jail. He was very much attacher to her, Judge, and there is [fol. 33] not any doubt in my mind that it struck a serious blow to the defendant. I am inclined to think, having spoken to him, that it did have some effect upon him in regard to the violations that he committed, the seriousness of the matter, and what it brought home to his family, his own family, the four children and his wife, who have experienced untold economic hardships and failures because of this case, Judge.

His mother died, which wrought a great change in this man. He is not the same fellow that he was before, your Honor, back in 1954 and 1955, lost about 55 pounds while in jail, and there is no doubt in my mind, Judge, and I could go on with other things that I have here in my notes, although I don't think it is necessary in the face of what we have here, considering what his wife and family in their lives have gone through, and that has had the deterrent effect that would be necessary upon this defendant, and I am sure that if your Honor gives a lesser sentence here, if your Honor can see your way clear to do that and place him on probation for a period to commence at the expiration of the lesser offense, and with the 25-year sentence [fol. 34] hanging over his head, that I feel certain, Judge, he will never come in here again. Of course, your Honor heard this statement before, but I honestly feel sincere when I make this statement to your Honor, that it will keep him in the straight and narrow path, that he will not stray from it, and that he will come out and take care of his family as he should take care of his wife and rear his children properly. I have met the children on numerous occasions, Judge. Of course, anybody has compassion for the children and when they are hurt their heart bleeds for them, and I am making my plea to your Honor in all earnestness, and I make that not only for Donovan but for the family, Judge.

COURT'S RULING ON SENTENCE

The Court: All right. Well, needless to say, I have given a great deal of thought to this since the Court of Appeals concluded that I had the power to suspend the 25-year sentence, and I have concluded that I cannot in connection

with Donovan or Andrews do that; in other words, the two men who perpetrated the holdup of the truck. I think that they have to serve that sentence. That is a harsh sentence but eligibility for parole comes into play after one-
[fol. 35] third of the time is served if you maintain your record.

Now, you may have your hopes in that regard, but I do not have the least idea as to how it will turn out in that respect.

I am sorry to say I do not think I can suspend sentence and permit you to serve only the sentence that a person has to serve who has conspired but did not carry out the crime.

As to Mr. Cohen, I am somewhat unhappy with the choice that I regret that I have, that is, as to the five years or the 25 years. However, in your case I will take the chance and suspend the 25-year sentence. You have had a very good prison record. Frankly, if you had been with the other two on the truck I would not suspend your sentence. It seems to me that if there is any justification for a mandatory sentence, this is it, and although I dislike to do it Congress has decided that where a post office truck is held up there is to be no choice as to the sentence. If you had been there I would have imposed the same sentence, but it just so happens you were not and you were just about a hair's breadth away from the matter where some such evidence might have been shown.

[fol. 36] As I say, I will take the chance as to the 25-year sentence and I will suspend the execution of it and place you on probation for five years after the termination of your prison sentence.

Now, with respect to your disappointment, I give you a word of advice and that is don't allow your disappointment or your displeasure to show up in your prison records. In other words, keep on in your activities in prison and have your prison records as clean as it possibly can be.

Now, Mr. Cohen, don't you disappoint, because no matter how well you behave, in view of the seriousness of the crime, it may be in the cards, I don't say that it is or that it could be, but I am just cautioning you against doing anything that may spoil your future.

Mr. Friedman: If I may say one statement on the record, your Honor——

The Court: Yes.

Mr. Friedman: Do I take it that your Honor feels that with respect to the first count of the indictment your Honor does not have the power to impose that sentence?

[fol. 37] The Court: I would like to make that clear once and for all so that nobody has any hopes being built up or to be built up. I do not think I have any power to sentence only under that count, but even if I thought I had the power I would not execute it, so don't waste your time because, as I say, in the case of the two men who have committed the holdup, I don't recall that I ever had any doubt about it but that I would impose the sentence under Count 2. I always had it, and on the day of sentence as well.

Mr. Friedman: Not to detract from anything your Honor said, and, of course, I do not mean to inquire into your judicial conscience or anything like that, but if it had been permissible that Your Honor should impose or could impose not exceeding a 10-year sentence on the first one and suspend on the second, do I have, or it is my impression now—and if I am wrong in that if your Honor will please correct me—I have the impression that you might have imposed a lesser sentence because your Honor always considered the 25-year sentence as being harsh.

The Court: Yes, it is a harsh one, but, as I say——

Mr. Friedman: Not merely as to the co-defendant Cohen, [fol. 38] and may I not ask also as to the others, and I trust I am not transgressing any propriety in doing it, or in asking that if your Honor had the power to impose such a sentence where——

The Court: Now, Mr. Friedman, I am not going to stand cross-examination. I think we are through as far as sentence is concerned. I have ruled, and if there is anything else you wish to discuss I will hear you.

Mr. Friedman: I just wanted to note on the record just for the preservation of any rights which may be involved with respect to the defendants Andrews and Donovan that I note an exception to the ruling of the sentence imposed on the first count regardless of what disposition your Honor might have made.

The Court: I will call to the attention of whoever reads this record that there was no such intention expressed on my part until you asked me after sentence had been imposed, because my sentence would be exactly the same regardless of which count your remarks may be addressed to.

[fol. 38a] Court reporter's certificate to foregoing transcript omitted in printing.

[fol. 39] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

C 145-191

UNITED STATES OF AMERICA,

v.

ALBERT ANDREWS, Defendant.

ORDER REAFFIRMING JUDGMENT—May 29, 1957

A judgment having been entered herein against the above-named defendant on the 31st day of December, 1954, and an appeal having been taken from said judgment to the United States Court of Appeals for the Second Circuit, and the United States Court of Appeals having affirmed said judgment but remanded the cause for resentence on Count 2 of the indictment;

And the resentence on Count 2 of the indictment having come on to be heard on the 20th day of May, 1957, and after hearing Paul W. Williams, United States Attorney for the Southern District of New York, by Adelbert C. Matthews, Jr., Assistant United States Attorney, and Jacob W. Friedman, attorney for defendant on said resentence, and due deliberation having been had thereon, it is

Ordered, that the judgment dated the 31st day of December, 1954, entered herein, remain unchanged and in full force and effect.

Dated: New York, N. Y., May 29, 1957.

(Illegible), U. S. D. J.

[fol. 40] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

C 145-191

UNITED STATES OF AMERICA,

v.

ROBERT L. DONOVAN, Defendant.

ORDER REAFFIRMING JUDGMENT—May 29, 1957

A judgment having been entered herein against the above-named defendant on the 31st day of December, 1954, and an appeal having been taken from said judgment to the United States Court of Appeals for the Second Circuit, and the United States Court of Appeals having affirmed said judgment but remanded the cause for resentence on Count 2 of the indictment;

And the resentence on Count 2 of the indictment having come on to be heard on the 20th day of May, 1957, and after hearing Paul W. Williams, United States Attorney for the Southern District of New York, by Adelbert C. Matthews, Jr., Assistant United States Attorney, and Frank E. Healy, attorney for defendant on said resentence, and due deliberation having been had thereon, it is

Ordered, that the judgment dated the 31st day of December, 1954, entered herein, remain unchanged and in full force and effect.

Dated: New York, N. Y., May 29, 1957.

(Illegible), U. S. D. J.

[fol. 41] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

C 145-191

UNITED STATES OF AMERICA,

v.

ROBERT L. DONOVAN, Defendant.

MOTION TO VACATE ILLEGAL SENTENCE—Filed April 17, 1961

Comes now the defendant, Robert L. Donovan, and moves the Court to vacate the sentence of 25 years imposed on the 31st day of December, 1954 and affirmed after remand on the 29th day of May, 1957, in the above entitled case for the reason the defendant was not afforded an opportunity to make a statement in his own behalf as provided in Rule 32 (a), Federal Rules of Criminal Procedure, either at the time of the original sentence on December 31, 1954 or on the date of resentence after remand on May 29, 1957.

Wherefore, the defendant prays that the sentence aforesaid be vacated and he be resentenced in accordance with the Federal Rules of Criminal Procedure.

Robert L. Donovan, (Defendant).

[fol. 42] MEMORANDUM IN SUPPORT OF MOTION

Statement of the Case

The defendant, with others, was convicted on a jury trial of conspiracy (18 U.S.C. 371) and violation of the Federal Mail Robbery Act (18 U.S.C. 2114). Sentences of 5 years on the conspiracy count and 25 years on the substantive offense were imposed. Said sentences were ordered to be concurrent.

Subsequently, the Court of Appeals remanded the case for consideration under 18 U.S.C. 3651. (242 F. 2d 61). The trial judge after a hearing on May 29, 1957, ordered

that the original sentence of 25 years imposed on December 31, 1954, "Remain unchanged and in full force and effect."

While the defendant's attorney spoke at some length at both the time of the original sentence and at the hearing on the remand, the defendant was not afforded an opportunity to speak in his own behalf at either proceeding.

Argument

Rule 32 (a) in pertinent part provides:

> "Before imposing sentence the Court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment."

From the Record it is obvious that the Court did not comply with the express provisions of Rule 32(a) cited above and this omission may have been prejudicial to the defendant. This is especially so, in respect to the hearing for resentence after the order for remand. The Court of Appeals held that the provisions of 18 U.S.C. 3651 were applicable to the defendant at the discretion of the trial court. (242 F. 2d 61 at page 64). It is not outside the realm of possibility that the defendant, "with halting eloquence," may have swayed the judge into granting probation on Count III. Also, the defendant had a legal reason to put to the court relative to the legality of the mandatory sentence imposed on Count III.

[fol. 43] The defendant's right of allocution stems from the common law. See *Anonymous*, 3 Mod. 265, 266, 87 Eng. Rep. 175 (K.B.). However, as recently as February 27th of this year, the Supreme Court determined that Rule 32(a) defines a personal right which is not satisfied by a statement of counsel. In *Green* v. *United States*, 1961, 81 S Ct. 653, No. 70, October Term, 1960, Mr. Justice Frankfurter stated:

> Taken in the context of its history, there can be little doubt that the drafters of Rule 32(a) intended that the defendant be personally afforded the opportunity to speak before imposition of sentence. . . . The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting elo-

quence, speak for himself . . . We . . . reject the Government's contention that merely affording defendant's counsel the opportunity to speak fulfills the dual role of Rule 32(a)."

In the instant case, the mandatory provision of Section 2114 demanded that the defendant be granted every right due him under the law. A defendant, facing a mandatory sentence of 25 years, should be afforded every opportunity provided by law to personally plead his case for probation —as probation is the only alternative the Court has for the mandatory 25 years.

Conclusion

It is respectfully submitted that the defendant be afforded an opportunity to personally "make a statement in his own behalf" and "to present . . . information in mitigation" of his sentence.

Robert L. Donovan, (Defendant).

[fol. 44] In United States District Court for the Southern District of New York

C 145-191

United States of America,

vs.

Robert L. Donovan

Proposed Motion Re Notice of Appeal

Comes now the defendant Robert L. Donovan, and respectfully moves that the Court order the Clerk to prepare and file a Notice of Appeal should the Court deny the motion under Rule 35, Federal Rules Criminal Procedure, now filed and pending in this Court in the above numbered cause.

This procedure is necessary owning to the ten day Rule for Notice of Appeal where the defendant is confined some 3000 miles from the Court.

Respectfully submitted, Robert L. Donovan, Box 1420, Alcatraz, California.

[fol. 45] 4/12/6-

From: Robert L Donovan, #1420 Alcatraz California

To: Office of the Clerk, U.S. District Court, Foley St. N.Y.

Re: U.S.A. v. Robert L Donovan Cr. 145-191

DEAR MR. OLEAR:

Thank you for your very kind and considerate letter and enclosures. I sincerly appreciate same.

Please file my motion to vacate under the provisions of Rule 35 Federal Rules Criminal Procedure.

I respectfully request that your office enter my Notice of Appeal in the event of denial, for I understand under Rule 35 I would have only 10 days to appeal.

Thanking you for your patience and kindness, I remain,

Respectfully yours, Robert L Donovan.

[fol. 46] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

C 145-191

UNITED STATES OF AMERICA,

vs.

ROBERT L. DONOVAN, Defendant.

SUPPLEMENT TO MOTION FILED UNDER RULE 35, FEDERAL RULES CRIMINAL PROCEDURE—Filed April 26, 1961

Comes now the defendant and submits the following citation of the Supreme Court in support of his motion under Rule 35 now pending in this Court:

Van Hook v. *United States*, No. 705, October Term, 1960, 81 S. Ct. 823.

> "The judgment is reversed and the case remanded for resentencing in compliance with Rule 32 of the Federal Rules of Criminal Procedure, 18 U. S. C. A. Green v. United States, 365 U.S. 301, 81 S. Ct. 653, 5 L. Ed. 2d 670."

Robert L. Donovan, (Defendant).

[fol. 47] Certificate of service omitted in printing.

[fol. 48] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

C 145-191

UNITED STATES OF AMERICA,

against

ROBERT L. DONOVAN, Defendant.

MEMORANDUM ORDER DIRECTING RETURN OF DEFENDANT FOR RESENTENCING—June 16, 1961

Murphy, D. J.

Defendant's motion is granted and it is ordered that he be returned to this district for resentencing. Green v. United States, 365 U.S. 301. We have examined so much of the record in Van Hook v. United States, 365 U.S. 609, relating to the sentencing of that defendant and find that the prisoner was never asked whether he had anything to say pursuant to Rule 32(a) F.R.Crim.P. In examining the transcript of the proceedings before Judge Walsh insofar as they relate to defendant Donovan's sentencing, we are satisfied that at no time did Judge Walsh ask the defendant whether he had anything to say, although defendant's counsel was heard at length. We gather from *Green* and *Van Hook* this is not enough. Accordingly, it would appear that the defendant's right of allocution was denied him.

This is an order. No settlement is necessary.

[illegible], U. S. D. J.

Dated, New York, N. Y., June 16, 1961.

[fol. 49] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

C 145-191

UNITED STATES OF AMERICA,

v.

ROBERT L. DONOVAN, Defendant.

STATE OF NEW YORK,
COUNTY OF NEW YORK,
Southern District of New York, ss:

AFFIDAVIT IN OPPOSITION TO MOTION FOR RESENTENCING—Filed June 19, 1961

Arthur I. Rosett, being duly sworn, deposes and says:

I am an Assistant United States Attorney in the office of Robert M. Morgenthau, United States Attorney for the Southern District of New York, and as such am in charge of the above-entitled matter and am familiar with the files of this office relating thereto.

This affidavit is made in opposition to the motion of Robert L. Donovan for resentencing, pursuant to Rule 35 of the Federal Rules of Criminal Procedure.

The sole ground asserted by petitioner is that the sentence imposed upon him is illegal since he was not afforded an opportunity to make a statement in his own behalf and to present information in mitigation of punishment, as provided by Rule 32(a) of the Federal Rules of Criminal Procedure.

The petitioner was convicted on an indictment filed October 8, 1954. The first count of this indictment charges the petitioner, along with Albert Andrews and Hyman Cohen, with assaulting a Post Office employee who had lawful cus-[fol. 50] tody of mail, with intent to rob the mail, in violation of Title 18, United States Code, Section 2114. The second count charges a similar violation of Section 2114 but further alleges that in attempting to effect the robbery the

defendants put the life of the Post Office Department employee in jeopardy by use of a dengerous weapon, a loaded revolver. The third count charges a conspiracy to assault a Post Office employee with intent to rob him of the mail.

After a 5-day trial before Honorable Lawrence E. Walsh, and a jury, the three defendants were found guilty on all counts. Judgment of conviction was entered on December 31, 1954, sentencing each defendant to a term of 25 years imprisonment on the second count and a concurrent 5-year term on the third count. No sentence was imposed on the first count.

Attached hereto and made a part of this affidavit is a photostatic copy of the stenographic minutes of the sentencing.

On appeal, the Court of Appeals affirmed the judgments of conviction but remanded the case for resentence on the second count, holding that Judge Walsh may have erroneously believed that he had no power under 18 U.S.C. § 3651 to suspend sentence on that count. *United States* v. *Donovan*, 242 F. 2d 61 (2d Cir. 1957).

Judge Walsh resentenced the three defendants on May 20, 1957 on the second count. At that time Hyman Cohen received a suspended sentence on that count and the 25-year sentences were reimposed upon Donovan and Andrews.

Attached hereto and made a part of this affidavit is a photostatic copy of the stenographic minutes of these pro-
[fol. 51] ceedings before Judge Walsh on May 20, 1957. Petitioner appealed from the judgment on resentencing which was affirmed in open court. *United States* v. *Donovan and Andrews*, 252 F. 2d 788 (2d Cir.) *cert. denied* 358 U.S. 851 (1958). Subsequent Rule 35 proceedings by the co-defendant Andrews on issues other than those raised by this motion will not be set forth in detail here.

Although petitioner attacks the validity of both the 1954 sentencing and the 1957 resentencing it appears clear that he is presently incarcerated solely on the basis of the judgment of conviction entered by Judge Walsh on May 29, 1957. Since petitioner was resentenced at that time, it is unnecessary to consider any possible flaws in the original sentencing.

The principal authority relied upon by petitioner is the recent decision by the Supreme Court of the United States

in *Green* v. *United States*, 365 U.S. 301 (1961). There was no opinion of the Court in *Green*. Mr. Justice Frankfurter announced the judgment of the court in an opinion in which three other Justices joined. Mr. Justice Stewart concurred separately on independent grounds. The other four Justices dissented. In *Green* the Supreme Court affirmed the sentence imposed upon the petitioner. Because of the findings of fact made by the court, the four Justices, speaking through Mr. Justice Frankfurter, did not have occasion to consider Mr. Justice Stewart's position establishing a prospecting rule. Rather, the four Justices, speaking through Mr. Justice Frankfurter, found the record ambiguous as to whether the defendant had been explicitly afforded his right of allocution. This ambiguity, and the attendant circumstances, including defendant's fail- [fol. 52] ure to raise this point for a number of years, led these Justices to the conclusion that the petitioner had failed to show that the sentencing procedure was illegal. This opinion does not hold that were the sentencing defective it would be subject to collateral attack under Rule 35, Federal Rules of Criminal Procedure.

The circumstances of the May 20, 1957 resentencing make it equally clear that defendant was not deprived in this case of his opportunity to allocution.

After hearing legal argument from counsel, Judge Walsh ordered the defendants produced for resentencing (Tr. 12). At this point he inquired "is there anything you want to say now", whereupon counsel made statements before sentence, and at page 13 Mr. Friedman, Andrews' attorney said:

> "If your Honor please, Mr. Frank Healey is not present and he will also say something on behalf of the defendant Donovan and I will address a few remarks to your Honor with respect to the defendant Cohen and the defendant Andrews."

Mr. Healey did appear and made a lengthy statement on behalf of the petitioner (Tr. 16-21). These circumstances are almost identical to those in *Green* v. *United States*. There too the trial judge inquired "did you want to say something?" And there too the record did not indicate

to whom this remark was addressed. Mr. Justice Frankfurter said:

> [fol. 53] ". . . The single pertinent sentence—the trial judge's question "Did you want to say something? —may well have been directed to the defendant and not to his counsel. A record, certainly this record, unlike a play is unaccompanied with stage directions which may tell the significant cast of the eye or the nod of the head. It may well be that the defendant himself was recognized and sufficiently apprised of his right to speak and chose to exercise this right through his counsel. Especially is this conclusion warranted by the fact that the defendant has raised this claim seven years after the occurrence. The defendant has failed to meet his burden of showing that he was not accorded the personal right which Rule 32(a) guarantees, and we therefore find that his sentence was not illegal."

Petitioner's failure in this case to raise this point for four years must be viewed in the light of the extensive appellate and collateral litigation in which these defendants have engaged since 1957. Donovan prosecuted an appeal from this resentencing and sought certiorari from its affirmance. The volume of litigation has been great and the opportunities to raise this point, if in fact there had been some deprivation of right, were ample. As the Supreme Court's opinion in *Green* indicates, the right to allocution is not novel. It may be traced back as early as 1689. Anonymous, 3 Mod. 265, 266, 87 Eng. Rep. 175 (K.B.).

Petitioner also cites in support of his motion the Supreme Court's *per curiam* decision in *Van Hook* v. *United States*, 365 U.S. 609 The circumstances in that case are markedly dissimilar from those present here. *Van Hook* was a direct appeal from a criminal conviction in which the denial of allocution was raised by the defendant. Secondly, there was no ambiguity in the record as to the deprivation of right or any question of the waiver of that right by the [fol. 54] defendant. On the petition for certiorari, the United States of America confessed error, since it appeared

that neither the defendant nor his counsel were asked whether they had a statement before sentencing and therefore, the failure to comply with Rule 32(a) was apparent. It was on the basis of this confession of error that the Supreme Court granted certiorari and remanded the case for resentencing.

Whatever ambiguities may exist in the trial transcript must be assessed in the light of these circumstances.

At the time of sentencing petitioner was experienced in the ways of criminal courts. His record indicates that he had been convicted in at least seven previous criminal proceedings. This is not an inexperienced defendant, unfamiliar with criminal procedure and his rights thereunder.

Wherefore, it is respectfully prayed that the petitioner's motion for resentencing under Rule 35, be in all respects denied.

Arthur I. Rosett, Assistant U. S. Attorney.

Sworn to before me this 5th day of June, 1961.

Leo Cohen, Notary Public, State of New York.

Qualified in Kings County, No. 24-5742400.

Commission Expires March 30, 1962.

[fol. 55] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

C 145-191

UNITED STATES OF AMERICA,

v.

ROBERT L. DONOVAN, Defendant.

STAY ORDER—June 28, 1961

Upon the annexed affidavit of Arthur I. Rosett, Assistant United States Attorney for the Southern District of New York, duly sworn to on June 28, 1961, it is

Ordered, that the provision of the order of June 16, 1961 in the above-entitled matter requiring the return of Robert L. Donovan to the Southern District of New York for resentencing be and the same is stayed up to and including July 17, 1961.

Dated: New York, N. Y., June 28, 1961.

(Name illegible), U. S. D. J.

[fol. 56] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

C 145-191

UNITED STATES OF AMERICA,

v.

ROBERT L. DONOVAN, Defendant.

AFFIDAVIT IN SUPPORT OF APPLICATION FOR STAY

STATE OF NEW YORK,
COUNTY OF NEW YORK,
Southern District of New York, ss:

Arthur I. Rosett, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of Robert M. Morgenthau, United States Attorney for the Southern District of New York, and as such am familiar with and in charge of the above-entitled matter.

2. This affidavit is made in support of the application of the United States of America for a stay of the order of the Honorable Thomas F. Murphy, United States District Judge, dated June 16, 1961, granting Robert L. Donovan resentencing.

3. Judge Murphy's memorandum orders that the defendant be returned to this District for resentencing. It is the intention of this office to take timely appeal from this order and to prosecute the same diligently in the United States Court of Appeals for the Second Circuit.

4. Under Rule 37(a)(2), Federal Rules of Criminal Procedure, an appeal by the Government may be taken within 30 days after the entry of judgment or order appealed from. It is the intention of the United States Attorney for the Southern District of New York to file a notice of appeal within this time upon receipt of formal authorization to appeal from the United States Department of Justice, Washington, D. C.

[fol. 57] Wherefore, it is respectfully prayed that the order of June 16, 1961 in the above-entitled matter be stayed up to and including July 17, 1961.

Arthur I. Rosett, Assistant United States Attorney.

Sworn to before me this 28th day of June, 1961.

Jack W. Ballen, Notary Public, State of New York.

No. 41-0146400, Queens County.

Term Expires March 30, 1963.

[fol. 58] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

C 145-191

UNITED STATES OF AMERICA,

v.

ROBERT L. DONOVAN, Defendant.

NOTICE OF APPEAL—Filed July 14, 1961

Name of appellant: United States of America.

Name and address of appellant's attorney: Robert M. Morgenthau, United States Attorney for the Southern District of New York, United States Court House, Foley Square, New York 7, New York.

Offense: Assault of Post Office employee with lawful custody of mail with intent to rob with a dangerous weapon and conspiracy so to do. Title 18, United States Code, Sections 2114 and 371.

Order: Order of Honorable Thomas F. Murphy, entered in the Southern District of New York on June 16, 1961, granting motion for relief under Rule 35 F.R. Crim. P., on the ground that the trial judge failed to comply with Rule 32(a) F.R. Crim. P.

The above-named appellant hereby appeals to the United States Court of Appeals for the Second Circuit in the above-stated order.

Dated: New York, N.Y., July 13, 1961.

Robert M. Morgenthau, United States Attorney for the Southern District of New York, Attorney for Appellant, Office and Post Office Address: United States Court House, Foley Square, New York 7, N.Y.

[fol. 58a] Affidavit of mailing (omitted in printing).

[fol. 59] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

C 145-191

UNITED STATES,

v.

ANDREWS

LETTER REQUESTING VACATION OF JUDGMENT AND ORDER THEREON—Filed July 19, 1961

Box No. P.M.B. 25668-N.E.
Lewisburg, Pennsylvania
June 25, 1961.

The Honorable Thomas F. Murphy,
United States District Court,
Southern District of New York,
U. S. Courthouse—Foley Square,
New York 7, N. Y.

DEAR SIR:

It is my understanding that this Honorable Court vacated the judgment of my codefendant, Robert L. Donovan, on June 16, 1961, because his right of allocution was denied him. Rule 32(a) of the Federal Rules of Criminal Pro-

cedure; Green v. United States, 365 U.S. 301; and Van Hook v. United States, 365 U.S. 609.

Since the identical circumstances exist with me, I very respectfully request that this Honorable Court vacate my judgment. Thank you.

Respectfully submitted, Albert Andrews, #25668-N.E.

[fol. 60] July 18, 1961.

Motion granted.
Let the defendant be resentenced.

Thomas F. Murphy, U. S. D. J.

[fol. 61] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

C 145-191

UNITED STATES OF AMERICA,

v.

ALBERT ANDREWS, Defendant.

STATE OF NEW YORK,
COUNTY OF NEW YORK,
Southern District of New York, ss:

AFFIDAVIT IN OPPOSITION TO LETTER REQUESTING VACATION OF JUDGMENT—Filed July 19, 1961

Arthur I. Rosett, being duly sworn, deposes and says:

I am an Assistant United States Attorney in the office of Robert M. Morgenthau, United States Attorney for the Southern District of New York, and as such I am in charge of the above-entitled matter and am familiar with the facts thereof.

This affidavit is made in opposition to a letter of Albert Andrews to the Honorable Thomas F. Murphy, dated June 25, 1961, in the nature of an application to vacate the sentence under Title 28, United States Code, Section 2255.

As is indicated in this letter, petitioner Andrews was a co-defendant of and was sentenced at the same time as Robert L. Donovan. The factual and legal posture of this application therefore is identical to the similar motion of Robert L. Donovan. Incorporated herein as part of the Government's opposition to this application is the affidavit of Arthur I. Rosett, Assistant United States Attorney for [fol. 62] the Southern District of New York, duly sworn to on June 5, 1961, and attached photostatic copies of the stenographic transcript of the proceedings before the Honorable Lawrence E. Walsh, United States District Judge, at which both Donovan and the petitioner Andrews were sentenced.

Wherefore, it is respectfully prayed that the application of Albert Andrews to vacate the sentence under Title 28, United States Code, Section 2255, in all respects be denied.

Arthur I. Rosett, Assistant U. S. Attorney.

Sworn to before me this 30 day of June, 1961.

Jack W. Ballen, Notary Public, State of New York.

No. 41-0146400, Queens County.

Term Expires March 30, 1963.

[fol. 63] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

C 145-191

UNITED STATES OF AMERICA,

v.

ALBERT ANDREWS, Defendant.

NOTICE OF APPEAL—Filed July 31, 1961

Name of Appellant: United States of America.

Name and Address of Appellant's Attorney: Robert M. Morgenthau, United States Attorney for the Southern District of New York, United States Court House, Foley Square, New York 7, New York.

Offence: Assault of Post Office employee with lawful custody of mail with intent to rob with a dangerous weapon and conspiracy so to do. Title 18, United States Code, Sections 2114 and 371.

Order: Order of the Honorable Thomas F. Murphy entered in the Southern District of New York on July 18, 1961, granting motion for relief under Title 28, United States Code, Section 2255 on the ground that the trial judge failed to comply with Rule 32(a) F.R.Cr.P.

The above named appellant hereby appeals to the United States Court of Appeals for the Second Circuit in the above stated order.

Dated: New York, N. Y., July 31, 1961.

Robert M. Morgenthau, United States Attorney for the Southern District of New York, Attorney for Appellant, Office and Post Office Address: United States Court House, Foley Square, New York 7, N. Y.

[fol. 63a] Proof of Service (omitted in printing).

[fol. 64] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

C 145-191

UNITED STATES OF AMERICA,

v.

ALBERT ANDREWS, Defendant.

NOTICE OF MOTION FOR STAY—Filed August 1, 1961

SIR:

Please Take Notice, that upon the enclosed affidavit of Arthur I. Rosett, duly sworn to on the 31st day of July, 1961, upon all the proceedings heretofore had herein, the United States of America will move this Court at a stated term thereof for the hearing of motions in criminal causes to be heard in Room 318 of the United States Court House, Foley Square, Borough of Manhattan, City and State of New York, on the 7th day of August, 1961, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for a stay of the provision of the order of the Honorable Thomas F. Murphy, United States District Judge, in the above-entitled matter, requiring the return of Albert Andrews to the Southern District of New York for resentencing up to and including the time of the disposition of the appeal now pending from the above-mentioned order in the United States Court of Appeals for the Second Circuit, and for such other and further relief as the Court may deem just and proper.

Dated: New York, N.Y., July 31, 1961.

Yours, etc. Robert M. Morgenthau, United States Attorney for the Southern District of New York, Attorney for U.S.A., Office and P. O. Address: United States Court House, Foley Square, New York 7, N.Y. Telephone: COurtlandt 7-7100

To: Albert Andrews, Box P.M.B. 25688-N.E., Lewisburg, Pennsylvania.

[fol. 65] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

C 145-191

UNITED STATES OF AMERICA,

v.

ALBERT ANDREWS, Defendant

AFFIDAVIT IN SUPPORT OF APPLICATION FOR STAY—
July 31, 1961

STATE OF NEW YORK,
COUNTY OF NEW YORK,
SOUTHERN DISTRICT OF NEW YORK, ss:

Arthur I. Rosett, being duly sworn deposes and says:

1. I am an Assistant United States Attorney in the office of Robert M. Morgenthau, United States Attorney for the Southern District of New York, and as such am familiar with and am in charge of the above-entitled matter.

2. This affidavit is made in support of the motion of the United States of America for a stay of the order of the Honorable Thomas F. Murphy, United States District Judge, dated July 18, 1961, granting Albert Andrews resentencing.

3. On July 31, 1961 a notice of appeal was filed by the United States of America from this order. It is the intention of the United States of America to diligently prosecute this appeal in the United States Court of Appeals for the Second Circuit.

4. The issues presented on this appeal are substantial, and in fact, are indentical to those presented in *Hill* v. *United States* and *Machibroda* v. *United States*,

5. Unless Judge Murphy's order is stayed, the proceed-
[fol. 66] ings will be mooted and the Government will be denied appellate review of the substantial legal issues.

Wherefore, it is respectfully prayed that the order of July 18, 1961 in the above-entitled matter be stayed up to

and including the time of the disposition of the appeal now pending before the United States Court of Appeals for the Second Circuit.

Sworn to before me this 31st day of July, 1961.

Arthur I. Rosett, Assistant U. S. Attorney

Leo Cohen, Notary Public, State of New York.

Qualified in Kings County, No. 24-5742400.

Commission Expires March 30, 1962

[fol. 66a] Affidavit of Mailing (omitted in printing).

[fol. 67] Respectfully referred to Judge Murphy.

William B. Herland, USDJ.

Aug. 8, 1961.

Motion granted.

Thos F. Murphy, USDJ.

[fol. 68] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

C 145-191

UNITED STATES OF AMERICA,

v.

ROBERT L. DONOVAN, Defendant.

NOTICE OF MOTION FOR STAY—Filed August 1, 1961

SIR:

Please Take Notice, that upon the enclosed affidavit of Arthur I. Rosett, duly sworn to on the 31st day of July, 1961, upon all the proceedings heretofore had herein, the United States of America will move this Court at a stated term thereof for the hearing of motions in criminal causes to be heard in Room 318 of the U. S. Court House, Foley Square, Borough of Manhattan, City and State of New York, on the 7th day of August, 1961, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for a stay of the provision of the order of the Honorable Thomas F. Murphy, United States District Judge, in the above entitled matter, requiring the return of Robert L. Donovan to the Southern District of New York for re-sentencing up to and including the time of the disposition of the appeal now pending from the above-mentioned order in the United States Court of Appeals for the Second Circuit, and for such other and further relief as the Court may deem just and proper.

Dated: New York, N. Y., July 31, 1961.

Yours, etc. Robert M. Morgenthau, United States Attorney for the Southern District of New York, Attorney for U.S.A., Office and P. O. Address: United States Court House, Foley Square, New York 7, N.Y. Telephone: COurtlandt 7-7100.

To: Robert L. Donovan, Box 1420, Alcatraz, California.

[fol. 69] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

C 145-191

UNITED STATES OF AMERICA,

v.

ROBERT L. DONOVAN, Defendant.

AFFIDAVIT IN SUPPORT OF APPLICATION FOR STAY—July 31, 1961

STATE OF NEW YORK,
COUNTY OF NEW YORK,
Southern District of New York, ss:

Arthur I. Rosett, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of Robert M. Morgenthau, United States Attorney for the Southern District of New York, and as such am familiar with and am in charge of the above-entitled matter.

2. This affidavit is made in support of the motion of the United States of America for a stay of the order of the Honorable Thomas F. Murphy, United States District Judge, dated June 16, 1961, granting Robert L. Donovan re-sentencing.

3. On July 14, 1961, a notice of appeal was filed by the United States of America from this order. It is the intention of the United States of America to diligently prosecute this appeal in the United States Court of Appeals for the Second Circuit.

4. The issues presented on this appeal are substantial, and in fact, are identical to those presented in *Hill* v. *United States* and *Machibroda* v. *United States*, as to which writs of certiorari have been granted by the Supreme Court of the United States, 365 U.S. 841, 842.

5. Unless Judge Murphy's order is stayed, the pro-
[fol. 70] ceedings will be mooted and the Government will be denied appellate review of the substantial legal issues.

Wherefore, it is respectfully prayed that the order of June 16, 1961 in the above-entitled matter be stayed up to and including the time of the disposition of the appeal now pending before the United States Court of Appeals for the Second Circuit.

Sworn to before me this 31st day of July, 1961.

Arthur I. Rosett, Assistant U. S. Attorney.

Leo Cohen, Notary Public, State of New York.

Qualified in Kings County, No. 24-5742400.

Commission Expires March 30, 1962.

[fol. 70a] Affidavit of Mailing (omitted in printing).

[fol. 71] August 7, 1961.

Respectfully referred to Judge Murphy.

William B. Herland, USAJ.

Aug. 8, 1961.

Motion granted.

(Name illegible), USAJ.

[fol. 72] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 73] IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

C 145-191

UNITED STATES OF AMERICA, Appellant,

v.

ROBERT L. DONOVAN, Appellee.

NOTICE OF MOTION TO DISMISS APPEAL—July 26, 1961

SIRS:

Please Take Notice that upon the annexed motion and upon all the proceedings had theretofore in the above-entitled cause, the undersigned will move this Court, on a motion day thereof, to be held in the Federal Court Building, Foley Square, New York City, on the 7th day of August, 1961, for an order dismissing the appeal taken by the Government from an order of the District Court for the Southern District of New York in the above-entitled cause, on the ground that the District Court's order is not appealable.

Dated: July 26, 1961.

Yours, etc., /s/ Robert L. Donovan, pro se. Post Office Address: Box No. 1420, Alcatraz, California.

Copy to: United States Attorney, Southern District of New York, Federal Court Building, Foley Square, New York City.

[fol. 74] IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

C. 145-191

UNITED STATES OF AMERICA, Appellant,

v.

ROBERT L. DONOVAN, Appellee.

MOTION TO DISMISS APPEAL—Filed August 9, 1961

May It Please the Court:

Comes now Robert L. Donovan, appellee in the above-entitled cause, who moves this Court to dismiss the appeal taken by the Government from a decision of the United States District Court for the Southern District of New York, on the ground that said decision is not appealable by the Government.

Facts

Appellee moved the District Court under Rules 35 and 32(d) of the Federal Rules of Criminal Procedure to have his sentence set aside as illegal because of the failure to afford him allocution pursuant to the interpretation of Rule 32(d) in a recent United States Supreme Court decision. The motion was granted on June 16, 1961 and appellee was ordered returned to the sentencing court for resentence. The Government appealed, Notice of Appeal dated July 13, 1961.

Jurisdiction

The jurisdiction of this Court to rule on the instant motion is invoked under Rules 4(b) and 19(d)(b) of this Court, and Rule 56, F.R. Crim. P., 18 U.S.C.

Argument & Law

The order of the District Court is not appealable by the Government. 18 U.S.C. Sec. 3731, United States v. Shapiro, 7 Cir. 1955, 222 F.2d 836.

[fol. 75] A direct attack was made on the sentence in the Court below. The attack was made by motion pursuant to Rules 35 and 32(d), F.R. Cr.P. No civil action was

taken, (such as 28 U.S.C. 2255, or under the All Writs Act, 28 U.S.C.) This is and was purely a criminal action.

Only in two instances can the Government appeal a criminal case to the Court of Appeals, (1) dismissal of an indictment or any count thereof, and (2) from a decision arresting a judgment of conviction. 18 U.S.C. 3731.

For the same reasons set forth in United States v. Shapiro, supra, concerning the appealability by the Government of a motion granted a defendant under Rule 32(d), F.R. Cr.P., the motion made by appellee herein under Rules 35 and 32(d) is not appealable. In *Shapiro*, a motion was made to withdraw a four-year-old guilty plea. Motion granted. When the Government appealed, defendant moved to dismiss appeal since the decision was not appealable. The Court of Appeals ruled that it was not an appealable decision, stating, at page 839,

> "The motion constituted a direct attack on the defendant's conviction in the original criminal case."

The arguments in *Shapiro* should apply with even more force in the case at bar since the order being appealed from herein is such less of a "final judgment" than that in *Shapiro*. As in *Shapiro*, appellee did not attack his conviction collaterally; he made a direct attack on the sentence. The conviction still stands, and he is to be resentenced by the trial judge.

Conclusion

Wherefore, this motion should be granted and the appeal taken by the Government from the District Court's order should be dismissed since the order is not appealable.

Respectfully submitted, /s/ Robert L. Donovan, pro se.

[fol. 76] Consideration of the motion to dismiss is deferred until argument of the appeal.

H.J.F., U.S.C.J.

9 August 1961.

[File endorsement omitted.]

[fol. 77] IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

C 145-191

ALBERT ANDREWS, Appellee,

v.

UNITED STATES OF AMERICA, Appellant.

MOTION TO TRANSFER ALBERT ANDREWS TO FEDERAL DETENTION HEADQUARTERS—Filed August 9, 1961

To the Chief Justice and the Associate Justices of the U.S. Court of Appeals for the Second Circuit:

My sentence was vacated by the Honorable Thomas F. Murphy, U. S. District Judge for the Southern District of New York, on July 18, 1961, because my right of allocation was denied.

The Government, however, intends to appeal Judge Murphy's decision to this Court. Therefore, I respectfully move this Court to issue an order, remanding me forthwith to the Federal Detention Headquarters, 427 West Street, New York City, until a decision is rendered by this Court. The reasons being: to speedily obtain the necessary citations and law books; to study federal criminal law and procedure; to prepare the Reply Brief; to consult counsel; etc. Unless this motion is granted, I will be extremely handicapped.

Wherefore, the appellee respectfully prays that this Honorable Court will issue the necessary order, granting the requested relief.

Respectfully submitted, /s/ Albert Andrews, #25668.

Dated: July 25, 1961.

To: Office of the Clerk, U.S. Court of Appeals, for the Second Circuit, U.S. Courthouse—Foley Square, New York 7, N. Y. United States Attorney, Southern District of New York, U.S. Courthouse—Foley Square, New York 7, N.Y.

Office of the Warden, United States Penitentiary, Lewisburg, Pennsylvania.

[fol. 78] Motion Denied.

H.J.F., U.S.C.J.

August 9, 1961.

[File endorsement omitted.]

[fol. 79] IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Present: Hon. Henry J. Friendly, Circuit Judge.

ALBERT ANDREWS, Appellee,

v.

UNITED STATES OF AMERICA, Appellant.

ORDER DENYING MOTION TO TRANSFER—August 9, 1961

A motion having been made herein by appellant pro se to be transferred to Federal Detention Headquarters in New York City, New York,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is denied.

A. Daniel Fusaro, Clerk.

[fol. 80] [File endorsement omitted.]

[fol. 81] IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Present: Hon. Henry J. Friendly, Circuit Judge.

UNITED STATES OF AMERICA, Plaintiff-Appellant,

v.

ROBERT L. DONOVAN, Defendant-Appellee.

ORDER DEFERRING CONSIDERATION OF MOTION TO DISMISS APPEAL—August 9, 1961

A motion having been made herein by appellee pro se to dismiss the appeal for lack of jurisdiction,

Upon consideration thereof, it is

Ordered that consideration of said motion be and it hereby is deferred until the argument of the appeal.

A. Daniel Fusaro, Clerk.

[fol. 82] [File endorsement omitted]

[fol. 83] IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

C 145-191

ALBERT ANDREWS, Appellee,

v.

UNITED STATES OF AMERICA, Appellant.

NOTICE OF MOTION FOR BAIL—August 25, 1961

SIR:

Please Take Notice that on the annexed motion and upon all the proceedings heretofore had herein, Albert Andrews, the appellee will move this Court at a stated term hereof

for the hearing of motions in criminal cases, appointed to be held at the United States Courthouse, Foley Square, Borough of Manhattan, New York City, on the 28th day of August, 1961, at 10:30 a.m., or as soon thereafter that the Court may set, for an order dismissing the appellant's appeal or admitting the appellee to bail on his own recognizance, pursuant to Rule 19 (a) of this Court's rules and Rule 47 of the Federal Rules of Criminal Procedure; and for such other, further, and different relief as to this Court may appear just.

Dated: August 25, 1961.

Respectfully submitted, Anne Andrews (sister of appellee), 705 East Fifth Street, New York 9, New York.

To: Office of the Clerk, United States Court of Appeals, for the Second Circuit, U. S. Courthouse, Foley Square, New York 7, New York. United States Attorney, Southern District of New York, U. S. Courthouse, Foley Square, New York 7, New York. Office of the Warden, Lewisburg, Pa.

[fol. 84] IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

C 145-191

ALBERT ANDREWS, Appellee,

v.

UNITED STATES OF AMERICA, Appellant.

MOTION TO DISMISS THE APPEAL AND MOTION FOR BAIL—Filed August 31, 1961

To The Chief Justice and the Associate Justices of the United States Court of Appeals for the Second Circuit.

The motion of Albert Andrews respectfully shows:

1. I am the sister of the appellee, Albert Andrews, who is a citizen of the United States of America by birth; and that he is presently confined in the Federal Penitentiary of Lewisburg, Pennsylvania;

2. That he did forward a hand-written copy of this motion to me; and he did request that it be typed, notarized, mailed, and filed in his behalf;

3. Appellee respectfully moves this Court for an order, dismissing the appellant's appeal or admitting the appellee to bail on his own recognizance;

4. The jurisdiction of this Court is invoked pursuant to Rule 19 (a) of this Court's rules and Rule 47 of the Federal Rules of Criminal Procedure;

5. Appellant appeals for an Order of the Honorable Thomas F. Murphy, entered in the U. S. District Court for the Southern District of New York on July 18, 1961, granting appellee's motion because his right of allocution was denied him;

6. Appellee neither requested nor desires that the said motion be treated under Title 28, United States Code, Section 2255, as indicated by the appellant in its Notice of Appeal, filed on July 31, 1961. Appellee requests and desires that the said motion be treated under Rule 35 of the [fol. 85] Federal Rules of Criminal Procedure, which is the *proper* remedy. See *Green* v. *United States*, 365 U. S. 301, 81 S. Ct. 653, 5 L. Ed. 2d 670. *This is a Criminal case, not a civil case;*

7. Appellee contends that (1) the said Order of the District Court is not appealable to this Court by the United States Government; and (2) the appellee is entitled to be admitted to bail on his own recognizance;

8. The Court's attention is directed to these relevant excerpts from Title 18, United States Code, Section 3731; "An appeal may be taken by and on behalf *on* the United States from the district courts to a court of appeals *in all criminal cases* in the following instances; From a decision or judgment setting aside, or dismissing any indictment or information or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section; From a decision arresting a judgment of conviction except where a direct appeal to the Supreme Court of the United States is provided by this section; Pending the prosecution and determination of the appeal in the foregoing instances, the defendant *shall* be admitted to bail on his own recognizance.

9. In sum, the United States Government can appeal a

criminal case to this Court *only* in the following instances; (1) a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof; and (2) a decision arresting a judgment of conviction.

10. It is crystal clear that the United States Government cannot *legally* appeal Judge Murphy's decision to this Court (Cf. United States v. Shapiro, 7 Cir. 1955, 222 F. 2d 836); and that the appellee is entitled to be admitted to bail on his own recognizance.

11. This action is taken in good faith; he believes it to be meritorious; he is entitled to redress; and h*is* is now entitled to the relief sought.

12. That no previous application has ever been made to this or any other Court for the relief sought herein.

13. All statements herein are true and correct to the best of his knowledge and belief.

[fol. 86] 14. I, Anne Andrews, do hereby certify that I served copies of the foregoing motion on the Clerk of the United States Court of Appeals for the Second Circuit; the United States Attorney for the Southern District of New York; and the Warden of the Federal Penitentiary at Lewisburg, Pa. by mailing copies thereof in duly addressed envelopes, with postage pre-paid, on this 25 day of August, 1961.

Wherefore, the appellee respectfully prays that this Honorable Court will issue the necessary order, granting the requested relief.

Dated: August 25th, 1961.

Respectfully submitted, Anne Andrews, Sister of Appellee 705 East Fifth Street, New York 9, New York.

County of Queens,
State of New York, ss:

Subscribed and sworn to before me this 25th day of August, 1961.

David Feld, Notary Public, State of New York.

No. 41-6258550.

Qualified in Queens County.

Term Expires March 30, 1962.

[fol. 87] The motion for bail is denied.

The motion to dismiss the appeal is adjourned until the argument of the appeal.

H.J.F. U.S.C.J.

30 August 1961

[File endorsement omitted.]

[fol. 88] In United States Court of Appeals, Second Circuit

Present: Hon. Henry J. Friendly, Circuit Judge.

United States of America, Plaintiff-Appellant,

v.

Albert Andrews, Robert L. Donovan, Defendants-Appellees,

Hyman Cohen, Defendant.

Order Denying Motion for Bail and Adjourning Motion to Dismiss Appeal—August 31, 1961

A motion having been made herein by appellee, Albert Andrews, pro se to dismiss the appeal and/or to admit the appellee to bail on his own recognizance,

Upon consideration thereof, it is

Ordered that the motion for bail be and it hereby is denied.

Further ordered that the motion to dismiss the appeal be and it hereby is adjourned until the argument of the appeal.

A. Daniel Fusaro, Clerk.

[fol. 89] [File endorsement omitted.]

[fol. 90] IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Re: C 145-191

UNITED STATES OF AMERICA,

v.

ROBERT L. DONOVAN.

APPLICATION FOR BAIL—Filed October 23, 1961

The Defendant moved the Court below under the Fed. Rules Criminal Proc. relying on Rule 35 and 32(a) to set aside his sentence from a criminal conviction as illegal.

On June 16, 1961 the District Court ordered the sentence set aside and defendant brought to the Court for resentencing.

The defendant thereafter made application for Bail which on September 12, 1961 the Honorable Thomas Murphy, District Judge denied.

On July 14, 1961, the Government filed Notice of Appeal 28 days after the District Courts order, obviously pursuant to the time limits prescribed in Criminal Appeals Rule [fol. 91] 37 (a) (2) Fed. Rules Crim. Proc. Sec. 3731 Title 18 U.S.C. "Appeal by the United States" reads in part:

> "The appeal in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted."

On or about July 9, 1961, defendant-appellee moved the Court of Appeals to dismiss the appeal as an non-appealable order.

On July 16, 1961 the Government moved the District Court for a stay of its order to resentence defendant.

On July 31, 1961 before receiving defendants-appellee's reply to above motion for stay, the District Court granted the stay.

On August 16, 1961 Defendant-Appellee received the District Courts Ruling on Government's motion for stay and

wrote a letter to the District Court Judge to reconsider in the light of defendants reply and distance from Court. [fol. 92] On August 9, 1961 Judge Friendly of the Second Circuit ruled on defendant-appellee's motion to dismiss the appeal "deferred until Governments argument of appeal." Since the Government seems to rely on certain cases pending in the U.S. Supreme Court (see Governments motion for stay) obviously it cannot "diligently prosecute" the appeal.

Therefore, this being strictly a criminal proceeding and defendant claiming he will be released for legal reasons which he will state at re-sentencing time, defendant is entitled by statute to be admitted to bail on his own recognizance pending Government's appeal from 18 U.S.C. Section 3731:

> "Pending the prosecution and determination of appeal in the foregoing instances, the defendant shall be admitted to bail on his own recognizance."

The word "shall" makes it mandatory that defendant be bailed pending appeal, even though the appeal is being diligently prosecuted, which it cannot be because of the Government's position as stated in its motion for stay. [fol. 93] Wherefore, this application should be granted by reason of statute as above stated.

Respectfully, Robert L. Donovan, pro se.

Dated September 21, 1961.

Proof of Service

I, Robert L. Donovan, certify that I mailed a copy of the foregoing Application for Bail to the U.S. Attorney for the Southern District of New York on the above date.

Robert L. Donovan, pro se.

[fol. 94] Motion for bail pending appeal denied.

C.E.C., S.R.W., L.P.M., U.S.C.J.J.

October 23, 1961

[File endorsement omitted.]

[fol. 95] IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellant,

v.

ROBERT L. DONOVAN, Defendant-Appellee.

AFFIDAVIT IN OPPOSITION TO APPLICATION FOR BAIL—Filed October 23, 1961

STATE OF NEW YORK,
COUNTY OF NEW YORK,
Southern District of New York, ss:

Arthur I. Rosett, being duly sworn, deposes and says:

I am an Assistant United States Attorney in the office of Robert M. Morgenthau, United States Attorney for the Southern District of New York, and as such am in charge of the above-entitled appeal.

This affidavit is made in opposition to the application of Robert L. Donovan for bail and release on his own recognizance pending disposition of the appeal now pending upon this Court. On September 12, 1961, Thomas F. Murphy, United States District Judge, denied a similar application by Robert L. Donovan in the District Court. This Court has denied a similar application by Albert Andrews, Donovan's codefendant, and an application for bail on the same ground was denied by the Honorable John Marshal Harlan as Circuit Justice on September 20, 1961.

The orders appealed from by the Government order Do-

novan's and Andrews re-sentencing on the ground that at the time of the original sentence, the Judge did not inquire whether they had anything to say before imposing sentence. As indicated in the Government's brief on the mer-
[fol. 96] its, heretofore filed with this Court, this appeal is not founded on Title 18, United States Code, Section 3731 and the bail provisions of that section do not apply.

Were this Court to find that the order of the District Court is not appealable or should be affirmed, Donovan would be entitled only to be brought back to the District Court for re-sentencing. There is no question in this proceeding of the validity of the judgment of conviction. Thus there is no occasion to interrupt the serving of sentence.

The Government has diligently prosecuted this appeal, has docketed the record, filed its brief, and is prepared to argue its cause.

Wherefore, it is respectfully prayed that the application of Robert L. Donovan for enlargement on bail for release of his own recognizance, in all respects, be denied.

Arthur I. Rosett, Assistant United States Attorney.

Sworn to before me this day of October, 1961.

Jack W. Ballen, Notary Public, State of New York.

No. 41-0146400, Queens County.

Term Expires March 30, 1963.

[fol. 97] [File endorsement omitted.]

[fol. 98] IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Present: Hon. Charles E. Clark, Hon. Sterry R. Waterman, Hon. Leonard P. Moore, Circuit Judges.

UNITED STATES OF AMERICA, Plaintiff-Appellant,

v.

ALBERT ANDREWS, ROBERT L. DONOVAN,
Defendants-Appellees

HYMAN COHEN, Defendant.

ORDER DENYING APPLICATION FOR BAIL—October 23, 1961

A motion having been made herein by appellant pro se for bail pending appeal,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is denied.

A. Daniel Fusaro, Clerk.

[fol. 99] [File endorsement omitted.]

[fol. 100] IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 132—September Term, 1961

Submitted December 8, 1961

Docket No. 27135

UNITED STATES OF AMERICA, Appellant,

v.

ROBERT L. DONOVAN and ALBERT ANDREWS,
Defendants-Appellees.

Before: Waterman, Smith and Marshall, Circuit Judges.

OPINION—Decided March 23, 1962

Petitioners, who had been convicted in 1954, sentenced then to twenty-five years imprisonment and thereafter resentenced in 1957 to the same terms, petitioned in 1960, independently of each other, for further resentencing on the ground that their rights of allocution under Rule 32, Fed. Rules Crim. Proc., had been denied them. Their motions having been granted, United States District Court for the Southern District of New York, Murphy, J., the Government appealed. Both orders are reversed and causes remanded with instructions to dismiss the petitions.

Robert M. Morgenthau, U. S. Attorney, Southern District of New York (Arthur I. Rosett, Sheldon H. Elsten, Asst. U. S. Attorneys, of counsel), for Appellant.

[fol. 101] Robert L. Donovan, pro se., Annie Andrews, for Albert Andrews, pro se.

WATERMAN, Circuit Judge:

Robert L. Donovan and Albert Andrews were convicted in 1954 for having violated 18 U.S.C. § 2114, and twenty-five year terms of imprisonment were imposed upon them. See

U. S. v. *Donovan*, 242 F. 2d 61 (2 Cir. 1957). As a result of Donovan's appeal he and Andrews in 1957 were resentenced to serve the same twent-five year terms. Upon appeal the imposition of these sentences was affirmd. *U. S.* v. *Donovan and Andrews*, 252 F. 2d 788 (2 Cir.), *cert. denied* as to *Donovan*, 358 U. S. 851 (1958); as to Andrews, 358 U. S. 940 (1958).

Alleging that he had not been afforded an opportunity to make a statement in his own behalf prior to the imposition of sentence Donovan in 1960 applied to the sentencing court to have his sentence set aside. The application was entitled: "Motion to vacate illegal sentence, pursuant to Rule 32(a) and Rule 35, Federal Rules of Criminal Procedure."[1]

> (a) Sentence. * * * Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment.

The pertinent part of Rule 35 is as follows:

> The court may correct an illegal sentence at any time.

The undisputed facts are that when the case was called for sentence Donovan was present with his retained counsel; that the court inquired: "Is there anything you want to say now?"; and that thereupon in the presence of Donovan his counsel addressed the court at length.

[fol. 102] Though the trial judge found the facts to be as stated, Donovan's motion was granted. The court below held that statements made to the court by counsel were not enough and that Donovan's personal right of allocution under Rule 32(a) had been denied him. The court ordered that Donovan be brought from Alcatraz to the United States District Court for the Southern District of New York for resentencing. From this order the Government filed a Notice of Appeal, the docket entry being: "Filed Notice of Appeal by United States Attorney from order of Judge Murphy granting defendant Donovan's motion under Rule No. 35."

---

[1] The pertinent part of Rule 32(a) is:

It is clear from the decision in *Hill* v. *United States*, handed down January 22, 1962, —— U. S. ——, 82 S. Ct. 468, that it was error to have granted the motion.

However, before reversing the court below we have been asked to rule upon whether we have jurisdiction of the Government's appeal. Donovan's motion was treated below as a motion under Rule 35, Fed. Rules Crim. Proc., and he has maintained that the Government may not appeal from an adverse ruling upon a petition so brought. Be that as it may, the decision in *Hill* v. *United States*, *supra*, holds that the motion, if based upon Rule 35, was improperly grounded upon that rule, for petitioner does not complain that the sentence itself is an illegal one but complains that the sentencing court, *prior* to the imposition of sentence, denied him his right to address the court. As stated in the majority opinion in *Hill*, *supra* at——

> But, as the Rule's language and history make clear, the narrow function of Rule 35 is to permit correction at any time of an illegal *sentence*, not to re-examine errors occurring at the trial or other proceedings prior to the imposition of sentence. The sentence in this case was not illegal. The punishment meted out was not in excess of that prescribed by the relevant statutes, [fol. 103] multiple terms were not imposed for the same offense, nor were the terms of the sentence itself legally or constitutionally invalid in any other respect.

After he learned of the success Donovan had obtained Andrews filed an informal motion seeking the vacation of his sentence on the ground that he, too, had been denied his right of allocution. His motion was treated as a motion for collateral relief brought under 28 U. S. C. §2255; and the court held, as in the case of Donovan, that rule 32(a) had not been complied with, and ordered that Andrews be produced for resentence. The Government appealed.

Under the holding in *Machibroda* v. *United States*, decided February 19, 1962, —— U. S. —— (1961), 82 S. Ct. 510, we reverse the order of the district court entered upon the petition of Andrews. The Supreme Court there said:

> For the reasons stated in Hill v. United States, 368 U. S. ——, 82 Ct. 468, we hold that the failure of the District Court specifically to inquire at the time of

sentencing whether the petitioner personally wished to make a statement in his own behalf is not of itself an error that can be raised by motion under 28 U. S. C. §2255 or Rule 35 of the Federal Rules of Criminal Procedure.

After the Government's appeal had been perfected Andrews requested us to treat his petition as one brought under Rule 35 of the Federal Rules of Criminal Procedure in order to raise the doubts as to our appellate jurisdiction that Donovan had raised.

The United States, to be sure, is without any general appellate remedy from decisions adverse to it in criminal cases except to obtain review of adverse rulings contained within the purview of 18 U. S. C. § 3731.

[fol. 104] However, the insistence of the appellees that we should not take any appellate jurisdiction here is mistakenly based on the proposition that the district judge could have properly granted the resentencings under Rule 35. We have pointed out that Rule 35 has no application whatever to a petition based upon a failure to comply with Rule 32(a).

These motions were independent motions and treatable as such. They were not directed at obtaining any review of any judgment of criminal culpability or illegality of sentence. We hold that the Government is not barred from seeking review of the lower court orders. See *Carroll* v. *United States*, 354 U. S. 394, 403 (1957). If necessary to label the applications at all they are best labeled as petitions brought under 28 U. S. C. §2255 for it would be under that statute that meritorious claims of violations of Rule 32(a) would be entertainable. It would be correct to do so. In this area adjudication upon the underlying merits of claims is not hampered by reliance upon the titles petitioners put upon their documents. See *Hill* v. *United States*, *supra*. The Government is not prevented from appealing adverse decisions upon such petitions. 28 U. S. C. §2255, para. 6; 28 U. S. C. §2253.

Therefore, we take appellate jurisdiction of both of the government appeals, reverse both orders below, and direct that both petitions be dismissed by the district court.

MARSHALL, Circuit Judge (concurring): I concur in the result.

[fol. 105] IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Present: Hon. Sterry R. Waterman, Hon. J. Joseph Smith, Hon. Thurgood Marshall, Circuit Judges.

UNITED STATES OF AMERICA, Plaintiff-Appellant,

v.

ALBERT ANDREWS, ROBERT L. DONOVAN, Defendants-Appellees,

HYMAN COHEN, Defendant.

JUDGMENT—March 23, 1962

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the orders of said District Court be and it hereby is reversed and that the action be and it hereby is remanded with directions that both petitions be dismissed by the said District Court in accordance with the opinion of this court.

A. Daniel Fusaro, Clerk.

[fol. 106] [File endorsement omitted.]

[fol. 107] IN UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

Present: Hon. Sterry R. Waterman, Hon. J. Joseph Smith, Hon. Thurgood Marshall, Circuit Judges.

UNITED STATES OF AMERICA, Plaintiff-Appellant,

v.

ALBERT ANDREWS, ROBERT L. DONOVAN, Defendants-Appellees,

HYMAN COHEN, Defendant.

ORDER DENYING PETITION FOR REHEARING—April 27, 1962

A petition for a rehearing having been filed herein by realtor pro se, Robert L. Donovan.

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. Daniel Fusaro, Clerk.

[fol. 107a] [File endorsement omitted.]

[fol. 107b] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 108] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1961

No.

ROBERT L. DONOVAN, Petitioner,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—May 24, 1962

Upon Consideration of the application of petitioner,

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 26, 1962.

John M. Harlan, Associate Justice of the Supreme Court of the United States.

Dated this 24th day of May 1962.

[fol. 109] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1962

No. 51 Misc.

ALBERT ANDREWS, Petitioner,

vs.

UNITED STATES

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI —October 8, 1962

On petition for writ of Certiorari to the United States Court of Appeals for the Second Circuit.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari,

it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 491 and consolidated with No. 494 and a total of two hours is allowed for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Goldberg took no part in the consideration or decision of this motion and petition.

[fol. 110] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1962

No. 217 Misc.

ROBERT L. DONOVAN, Petitioner,

vs.

UNITED STATES

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI —October 8, 1962

On petition for writ of Certiorari to the United States Court of Appeals for the Second Circuit.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 494 and consolidated with No. 491 and a total of two hours is allowed for oral argument.

Mr. Justice Goldberg took no part in the consideration or decision of this motion and petition.

☆ U. S. GOVERNMENT PRINTING OFFICE 1962 682630 873

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 491

ALBERT ANDREWS,

Petitioner,

vs.

UNITED STATES.

No. 494

ROBERT L. DONOVAN,

Petitioner,

vs.

UNITED STATES.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

E. BARRETT PRETTYMAN, JR.
800 Colorado Building
Washington 5, D. C.
Attorney for Petitioners

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No. 491

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Petitioner,

vs.

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ROBERT L. DONOVAN,

Petitioner,

vs.

UNITED STATES.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

Opinions Below

The Court of Appeals rendered a single opinion in these cases reversing the orders of the District Court and direct-

ing that the resentencing petitions of both Andrews and Donovan be dismissed. The opinion of the Court of Appeals (R. 74-77)[1] is reported at 301 F.2d 376. The order of the District Court granting Donovan's motion to vacate his sentence and directing that he be returned to the Southern District of New York for resentencing (R. 40) is unreported. The order of the District Court granting Andrews' motion to vacate his judgment and directing that he be resentenced (R. 50) is also unreported.

Jurisdiction

The judgment of the Court of Appeals was entered March 23, 1962 (R. 78), and a petition for rehearing was denied on April 27, 1962 (R. 79). The orders granting the motions for leave to proceed *in forma pauperis* and granting the petitions for writs of certiorari were entered on October 8, 1962. 371 U.S. 812. The order in No. 491 appears at R. 80, and the order in No. 494 appears at R. 81.

The jurisdiction of this Court in both cases rests on 28 U.S.C. § 1254(1).

Constitutional Provision, Statutes and Rules Involved

The principal constitutional provision, statutes and rules involved are the Due Process Clause of the Fifth Amendment to the United States Constitution, 18 U.S.C. § 2114, 18 U.S.C. § 371, 28 U.S.C. § 2255, 18 U.S.C. § 3731, and Federal Rules of Criminal Procedure 32, 35 and 43, all of which are set out in Appendix A to this brief.

[1] The records for both Andrews and Donovan were consolidated and bore a single docket number throughout the proceedings below and have been consolidated in a single Transcript of Record in this Court.

Questions Presented[2]

No. 491

"1. Is a district court's order, which remands the case for resentencing, a final appealable judgment?

"2. When the district court denies a request for allocution at the sentence proceeding, is the sentence illegal and subject to collateral attack?

"3. When the district court fails to ask a Federal criminal defendant whether he had anything to say at the resentence proceeding, and resentences him under significant mistakes of fact, is the sentence illegal and subject to collateral attack?"

No. 494

I.

"(a) After a district court sets aside sentence (but not conviction) under Rule 32(a) of the Federal Rules of Criminal Procedure, and before re-sentence, can the Government appeal the District Court's order?

"(b) Whether a successful attack on a sentence is immune to Government appeal until the re-sentence which makes the judgment final is imposed?

II.

"Whether an attack on a sentence (not the conviction) pursuant to Rule 32(a), Fed. Rules Crim. Proc., is a direct attack—as Courts of Appeal hold under Rule 32(d)—or a collateral attack?"

---

[2] The questions presented are set forth here as they appeared in the petitions for writs of certiorari filed by Andrews and Donovan *pro se*, prior to the appointment of their present attorney by this Court. 371 U.S. 812, 885 (1962).

III.

"Where the sentencing minutes clearly show the facts to be as claimed by petitioner, and the District Court granted petitioner's motion on such facts, and the Court of Appeals read the record incorrectly, and reversed the District Court on such incorrect reading, and the Court of Appeals denied rehearing to correct its obvious errors of fact, did the Court of Appeals depart so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervision?"

Statement of the Case

Andrews, Donovan and one Hyman Cohen were found guilty in the United States District Court for the Southern District of New York on December 31, 1954, on a three-count indictment charging that they (1) assaulted a Post Office employee with intent to rob in violation of 18 U.S.C. § 2114, (2) put the life of the Post Office employee in jeopardy by the use of a dangerous weapon in violation of 18 U.S.C. § 2114, and (3) conspired together to violate the aforesaid statute in violation of 18 U.S.C. § 371 (R. 12-15). Each defendant was sentenced to a prison term of 25 years on Count Two and five years on Count Three, the sentences to run concurrently. No sentence was imposed on Count One, because Count One was deemed to have merged into Count Two upon conviction on both counts (R. 16-19). Neither Andrews nor Donovan was asked at the time of sentencing whether he had anything to say in his own behalf or in mitigation of sentence (Original Transcript on file with this Court, Appendix B to this brief).

The Second Circuit Court of Appeals affirmed the convictions but remanded the case for resentencing of all three defendants on Count Two, holding that the District Court

was in error in thinking that it had no power to suspend sentences on that count. *United States* v. *Donovan*, 242 F.2d 61 (2d Cir. 1957).

On May 15, 1957, Jacob W. Friedman, Esq., representing all three defendants (R. 20), appeared before the Honorable Lawrence E. Walsh, District Judge. The court minutes indicate that Frank A. Healey, Esq., was also present representing Mr. Donovan (R. 20). Mr. Friedman asked that resentencing be deferred so that he would have an opportunity to prepare a brief regarding the extent of the Court's power in resentencing the defendants (R. 20-21), and the Court deferred resentencing for five days (R. 21).

On May 20, 1957, at 2:30 p.m., the case was called, and the Assistant United States Attorney and Mr. Friedman announced that they were ready (R. 21). The record indicates that Mr. Healey, the attorney for Donovan, was not present at this time.[3] The following colloquy took place:

> The Court: Are the defendants present?
>
> Mr. Friedman: I understand that they are on their way up, your Honor.
>
> The Court: All right.
>
> Mr. Friedman: I am sorry, your Honor, but I did not have the opportunity, as I was away for a few days, to prepare a memorandum of law.
>
> The Court: Yes. [R. 21.]

Despite the absence of the defendants and Mr. Healey, Mr. Friedman then presented an extended legal discussion of the law in regard to sentencing. The purport of the first

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[3] After the Assistant United States Attorney and Mr. Friedman addressed the court, a recess was taken. When the Court resumed its session, Mr. Friedman stated: "If your Honor please, Mr. Frank Healey *is now present* and he will also say something on behalf of the defendant Donovan * * * " (R. 26, emphasis added).

part of his argument was that Counts One and Two were separate offenses and did not necessarily merge (R. 21-22), the point being that the District Court should grant a light sentence on Count One and suspend sentence on Count Two. He stated no grounds at this time for suspending sentence on Count Two except that, "With regard to the prospective cases, the District Attorney, I understand, your Honor has comprehensive reports concerning their families and their background" (R. 23).[4] Mr. Friedman pointed out for the second time that he represented all three defendants, although they were "differently situated" (R. 23). He concluded by stating that the five-year sentence on Count Three "remains unaffected" (R. 24).[5]

The Court indicated that it understood Mr. Friedman's "point on the law" (R. 24).

Mr. Matthews, the Assistant United States Attorney, then asked to be heard, and he presented his argument that there was a merger as to Counts One and Two, that the Court was limited in regard to Count Two to giving the defendants either suspended sentences or resentences of 25 years, and that the Court could not resentence on Count Three (R. 24-25).

The Court then stated: "Well, I think that this is about as far as we need go now *without the defendants being present*. Therefore we will take a short recess on this matter and go ahead with the Hudson & Manhattan [case]

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[4] The reporter's punctuation makes it unclear whether Mr. Friedman was saying that the District Attorney was in possession of reports, or that the District Attorney had indicated His Honor was in possession of reports. Apparently the latter was the case (see R. 26).

[5] A time check on the reading of Mr. Friedman's statement indicates that he spoke for some seven minutes out of the presence of the defendants.

until the defendants are brought up here and are present" (R. 25, emphasis added). A short recess was taken.

Following the recess, the following colloquy took place:

> The Clerk: United States v. Donovan and others.
> The Court: Are all of the defendants present now?
> The Clerk: Yes, sir.
> The Court: Is there anything you want to say now?
> Mr. Matthews [the Assistant United States Attorney]: Yes, your Honor. As your Honor is aware, this involves the resentencing of the three defendants, Donovan, Andrews and Cohen, and as your Honor was the trial judge in this matter I don't think it is necessary to go into detail as to the facts except in a very, very general way. [R. 25.]

The Assistant United States Attorney continued with a capsule version of the crime. He stated: "The Government does not have much information on the background of these individual defendants, your Honor, but I notice that you have a presentence report. However, if you want any additional information I will be glad to attempt to supply it" (R. 26).

Without specifically being asked to speak by the Court, Mr. Friedman then noted the presence of Mr. Healey and gave a statement first on behalf of Mr. Cohen and then on behalf of Mr. Andrews (R. 26-28), noting that "the best possible sentence for any defendant is the least sentence that is consonant with justice and fairness * * * " (R. 27).

Mr. Friedman was followed by Mr. Healey, who spoke on behalf of Mr. Donovan. Mr. Healey mentioned probation several times but also said, "There must be some punishment, there is not any doubt in my mind about that" (R. 29).

Without affording the defendants an opportunity to make statements in their own behalf or to present information in mitigation of punishment, Judge Walsh proceeded immediately to make a statement and to sentence the defendants. During the course of his statement, Judge Walsh showed that he was under a misapprehension as to the part played by Andrews in the crime.[6] He suspended Mr. Cohen's 25-year sentence and placed him on probation for five years, to begin upon termination of his sentence on Count Three (R. 4, 31). Judge Walsh "resentenced" Andrews and Donovan to 25-years' imprisonment on Count Two (R. 4, 31-34).

The Court of Appeals reaffirmed the judgments of conviction as to Andrews and Donovan, *United States* v. *Donovan*, 252 F.2d 788 (2d Cir. 1958), and this Court denied certiorari, *Andrews* v. *United States*, 357 U.S. 940 (1958); *Donovan* v. *United States*, 358 U.S. 851 (1958).

On April 17, 1961, Donovan filed a motion pursuant to Federal Rule of Criminal Procedure 35 (R. 35, 37, 38, 39; see R. 41, 45, 48) to vacate his sentence on Count Two and to resentence him because he had been denied his right of allocution under Federal Rule of Criminal Procedure 32 (a) at the time of both his original sentencing and his resentencing (R. 3[illegible]).

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[6] Judge Walsh thought that Andrews was on the truck with Donovan when the crime was committed. Thus, he referred to "• • • Donovan or Andrews • • • the two men who perpetrated the holdup of the truck • • •" (R. 31); "• • • if you [Cohen] had been with the other two on the truck I would not suspend your sentence" (*ibid.*); "If you [Cohen] had been there I would have imposed the same sentence • • •" (*ibid.*); "• • • in the case of the two men who have committed the holdup • • •" (R. 32). Actually, Andrews was away from the truck and unarmed during the holdup. See *United States* v. *Donovan*, *supra*, 242 F.2d at 62; Government's Brief in Opposition, *Andrews* v. *United States*, No. 992 Misc., October 1959 Term, p. 2; Government's Brief in Opposition, *Donovan* v. *United States*, No. 97 Misc., October 1958 Term, p. 7.

On June 16, 1961, Judge Thomas F. Murphy ordered: "Defendant's motion is granted and it is ordered that he be returned to this district for resentencing. * * * This is an order. No settlement is necessary" (R. 40).

On June 25, 1961, Andrews wrote to Judge Murphy that since his circumstances had been identical with those of Donovan, "I very respectfully request that this Honorable Court vacate my judgment" (R. 49-50). Neither the letter nor the docket entry made any mention of Rule 35 or 28 U.S.C. § 2255 (R. 10, 49-50). In an affidavit filed by an Assistant United States Attorney in opposition to Andrews' request, it was conceded that "The factual and legal posture of this application therefore is identical to the similar motion of Robert L. Donovan" (R. 50-51). Nevertheless, the Assistant United States Attorney treated Andrews' request as "in the nature of an application to vacate the sentence under Title 28, United States Code, Section 2255" (R. 51).

On July 18, 1961, Judge Murphy issued an order in the *Andrews* case which read: "Motion granted. Let the defendant be resentenced" (R. 50).

The Government sought a stay of Judge Murphy's resentencing orders on the ground that a timely appeal would be taken to the Court of Appeals (R. 47, 53-58). In sworn affidavits supporting the applications for a stay, an Assistant United States Attorney stated: "Unless Judge Murphy's order is stayed, the proceedings will be mooted and the Government will be denied appellate review of the substantial legal issues" (R. 54, 57). Judge Murphy granted a stay of both his orders (R. 46, 55, 58).

The Government appealed (R. 48-49, 52), and the Court of Appeals deferred decision on motions to dismiss filed

by Andrews and Donovan (R. 59-61, 65-67).[7] On March 23, 1962, the Court of Appeals, in an opinion written by Judge Waterman and joined in by Judge Smith (Judge Marshall concurred in the result), held that it had jurisdiction over the Government's appeals, that the District Court had erroneously granted the petitions for resentencing, and that the petitions therefore must be dismissed by the District Court (R. 74-77). The holding that the Court of Appeals had jurisdiction was based on the assumption that the District Court could not have granted relief under Rule 35, that the petitions were more properly claims under 28 U.S.C. § 2255, and that the Government could appeal adverse decisions under § 2255 (R. 77). The ruling that the District Court erroneously granted the petitions for resentencing was based upon the following statement of what occurred at the resentencing:

> The undisputed facts are that when the case was called for sentence Donovan was present with his retained counsel; that the court inquired: "Is there anything you want to say now?"; and that thereupon in the presence of Donovan his counsel addressed the court at length. [R. 75.]

The Court held that under these circumstances, this Court's decisions in *Hill* v. *United States*, 368 U.S. 424 (1962), and *Machibroda* v. *United States*, 368 U.S. 487 (1962), required reversal (R. 75-76).

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[7] In his motion to dismiss the appeal, Andrews specifically asserted that he neither requested nor desired that his application for resentencing be treated as a petition under 28 U.S.C. § 2255, but rather that it should be treated as a motion under Rule 35 (R. 66).

Summary of Argument

There are three independent and compelling reasons why the Court of Appeals should be reversed:

1. Petitioners' prior sentences have been vacated, and the resentencing ordered by the District Court has yet to take place. Therefore, whether the District Court's orders are considered part of the criminal case or part of a separate proceeding, they were entirely interlocutory and nonfinal in both form and substance. Such orders may not be appealed in criminal cases (*DiBella* v. *United States*, 369 U.S. 121 (1962); *Carroll* v. *United States*, 354 U.S. 394 (1957)), or in proceedings under 28 U.S.C. § 2255. *Collins* v. *Miller*, 252 U.S. 364 (1920); 28 U.S.C. §§ 2253, 2255. This is particularly true where the Government is the appellant.

2. Even if considered final, the District Court's orders were not appealable, since they were entered—and properly so—pursuant to Federal Rule of Criminal Procedure 35 and were part of the criminal case. The only final appeals allowed the Government in criminal cases are those specifically enumerated in 18 U.S.C. § 3731. The Government's appeals in this case did not fall within § 3731.

3. Even if the District Court's orders were appealable, they were correctly entered. Petitioners are entitled to be resentenced not only because they were denied their right of allocution but also because a number of aggravating circumstances accompanied the denial. See *Hill* v. *United States*, 368 U.S. 424 (1962); *Green* v. *United States*, 365 U.S. 301 (1961). Not the least of these circumstances was the absence from the courtroom of petitioners and a defense attorney during a vital part of the sentencing procedure.

ARGUMENT

I.

The orders of the District Court were entirely interlocutory and non-final, and the Court of Appeals lacked jurisdiction over them.

The orders of the District Court directing that petitioners be resentenced—whether viewed as part of the criminal case (see II, *infra*) or as part of an independent civil proceeding, and whether entered correctly (see III, *infra*) or erroneously—were non-final, interlocutory orders which the Court of Appeals had no jurisdiction to review on appeal.

The jurisdiction of the Court of Appeals is limited to "final decisions" of the District Court in virtually all civil and criminal cases (28 U.S.C. § 1291), to "the final order" of the District Court in habeas corpus cases (28 U.S.C. § 2253), and to orders "entered on the motion as from a final judgment on application for a writ of habeas corpus" in proceedings under 28 U.S.C. § 2255. A final order generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute judgment.[8]

In a criminal case, final judgment means sentence. Thus, in *Parr* v. *United States*, 351 U.S. 513, 518 (1956), this Court said:

> In general, a "judgment" or "decision" is final for the purpose of appeal only "when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined." * * * This rule applies in criminal as well as civil cases. * * *

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[8] *Bostwick* v. *Brinkerhoff*, 106 U.S. 3, 10 (1882); *Cobbledick* v. *United States*, 309 U.S. 323, 324-326 (1940); *Catlin* v. *United States*, 324 U.S. 229, 233 (1945).

> It is argued that the order dismissing the Corpus Christi indictment was "final" because it (a) terminated the prosecution under that indictment, and (b) cannot be reviewed otherwise than upon this appeal. We think neither point well taken. "Final judgment in a criminal case means sentence. The sentence is the judgment." * * *

And in *In re Eskay*, 122 F.2d 819 (3d Cir. 1941), Eskay was found guilty of criminal contempt and appealed prior to sentencing. The court held that the appeal would not lie:

> Judicial punishment, by definition, is a matter of judicial discretion. It can have no finality, therefore, until sentence is imposed. There is no dissent in the authorities. * * * The question being one of appellate jurisdiction it is, like all questions of jurisdiction, quite dehors action by the parties. * * * We either have or we haven't, and not having cannot act accordingly. There having been no sentence in the case at bar, the appeal must be dismissed. [*Id.* at 824.]

Similar rulings—that "judgment" in a criminal case means "sentence," and that there is no finality until sentence—are found throughout the cases.[9]

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[9] *E.g.*, *Berman* v. *United States*, 302 U.S. 211, 212 (1937) ("* * * Final judgment in a criminal case means sentence. The sentence is the judgment. * * * To create finality it was necessary that petitioner's conviction should be followed by sentence * * *"); *Alexander* v. *United States*, 201 U.S. 117, 122 (1906) ("This power to punish being exercised the matter becomes personal to the witness and a judgment as to him. Prior to that the proceedings are interlocutory in the original suit"); *Miller* v. *Aderhold*, 288 U.S. 206, 210 (1933) ("In a criminal case final judgment means sentence * * *"); *Massengale* v. *United States*, 278 F.2d 344, 345 (6th Cir. 1960) ("'Final judgment in a criminal case means sentence.' * * * In the absence of a sentence * * *, the decision lacks the finality which would allow this court to review it"). See also

The orders of the District Court directing that the petitioners be resentenced are almost classic examples of the interlocutory, non-final, non-appealable orders to which these cases refer.

The District Court granted Donovan's motion to *vacate* his sentence and ordered that he be returned to the Southern District of New York for resentencing (R. 35, 40). The order was self-executing, requiring no settlement (R. 40). Thus, Donovan's prior sentence was rendered null and void, and no new sentence was imposed; until resentencing, he stood in the shoes of any defendant who has been convicted but who has not yet been sentenced.

As to Andrews, the Government conceded that "The factual and legal posture of this application therefore is identical to the similar motion of Robert L. Donovan" (R. 51). The Court granted Andrews' application and ordered that "the defendant be resentenced" (R. 50). Andrews, like Donovan, was thus without a sentence as a result of the Court's order. The order as to him, like the order as to Donovan, did not put an end to any phase of the case, for it was in two parts. The first rendered void that which had gone before; the second directed that a further step be taken in the future. Until that step was taken, no result was reached, no injury done, no end accomplished.

This Court has stated many times the policy reasons why interlocutory appeals in situations such as this cannot be

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Pollard v. *United States*, 352 U.S. 354, 358 (1957); *Hill* v. *United States ex rel. Wampler*, 298 U.S. 460, 464 (1936); *United States* v. *Brown*, 301 F.2d 664, 665 (4th Cir. 1962); *Northern* v. *United States*, 300 F.2d 131, 132 (6th Cir. 1962); *Gilmore* v. *United States*, 264 F.2d 44, 45 (5th Cir.), *cert. denied*, 359 U.S. 994 (1959); *United States* v. *Swidler*, 207 F.2d 47, 48 (3d Cir.), *cert. denied*, 346 U.S. 915 (1953); *United States* v. *Knight*, 162 F.2d 809, 810 (3d Cir. 1947); *In re Eskay*, *supra*, 122 F.2d at 824; *In re Ringnalda*, 48 F. Supp. 975, 977 (S.D. Cal. 1943).

allowed. Not only do general principles of federal appellate jurisdiction require that review await final judgment, but insistence on finality has been found the only practical way to "discourage undue litigiousness and leaden-footed administration of justice, particularly damaging to the conduct of criminal cases." *DiBella* v. *United States*, 369 U.S. 121, 124 (1962). " • • • Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration." *Cobbledick* v. *United States*, *supra*, 309 U.S. at 325. All of the policy considerations pointed out in civil cases have been held particularly applicable to the criminal field (*DiBella* v. *United States*, *supra*, at 126; *Parr* v. *United States*, *supra*, 351 U.S. at 518-521), and even more applicable to the Government than to private parties. *Carroll* v. *United States*, *supra*, 354 U.S. at 400, 405, 406.

The wisdom of the rule against piecemeal, interlocutory appeals is particularly evident in the instant case. Upon resentencing, the District Court may, of course, place petitioners on probation or give them lesser sentences; but it is also possible that their sentences could remain the same, in which event the Government would in no way be prejudiced by the resentencing. In effect, then, the Government is seeking to appeal on the *possibility* that the District Court may in the future treat petitioners more leniently than they have been treated to date.[10]

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[10] The situation is analogous to that in *Cogen* v. *United States*, 278 U.S. 221 (1929), where the court held that orders denying motions to suppress evidence were not appealable and pointed out to the defendants that if they renewed their objection at trial, it might be sustained, in which event they would not have been hurt (*id.* at 224).

Similarly, in *Marion* v. *United States*, 164 F.2d 158 (9th Cir. 1947), the defendant moved for a new trial following his conviction and also for the appointment of counsel and for his own at-

In the meantime, while the Government seeks its review, based on a contingency, it is defeating the very right which petitioners seek to protect. Judge Murphy granted Donovan's motion for resentencing on June 19, 1961, and Andrews' motion on July 18, 1961, which means that there was a judicial determination more than a year and a half ago that these defendants were entitled as a matter of law to be resentenced. Yet they still have not been resentenced. For a year and a half they have served time in prison which they might well have spent on probation if the Government had not been allowed to appeal. Not only are Andrews and Donovan adversely affected, but if an interlocutory appeal lies in this case, the Government can hereafter use its appeal as a weapon and completely destroy the right of resentencing for any prisoner serving a minimum term of a year or two's duration. We have here not only delay in the final disposition of a criminal case but the use of delay to frustrate or obviate the very right sought to be protected.

Nor is delay the only burden involved. An indigent defendant granted the right to be resentenced and confronted by a Government appeal must face all of the problems incident to a *pro se* representation or to the appointment of an unknown attorney. This case illustrates the problems, because Andrews and Donovan were not represented by counsel before the Court of Appeals (R. 74), and they are represented before this Court by an appointed counsel whom they have never seen. Andrews' motion to be transferred to New York so that he could prepare for his appeal and "consult counsel" was denied (R. 62-63), and both he and

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tendance at the argument on his motion. The District Court denied the applications for an attorney and for the defendant's appearance. The Court of Appeals held that no appeal would lie from this decision. The right of counsel, as important as it was, did not supply finality, and the District Court might *grant* a new trial, in which event the defendant would have no need to appeal.

Donovan were forced to submit the case on papers prepared by themselves (R. 74). The attorney appointed by this Court has not had the invaluable advantage of personal communication with his clients, for the appeals are being heard in New York and Washington, whereas the petitioners are confined in Lewisburg, Pennsylvania, and Alcatraz, California.

For prisoners who are able to afford an attorney, an appeal by the Government means time, expense and labor which could better be spent preparing for the resentencing. It is true, of course, that "bearing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship." *Cobbledick* v. *United States*, *supra*, 309 U.S. at 325. But bearing the expense of a trial is one thing; it is quite another to bear the expense of defending a totally unnecessary appeal by the Government in a situation where the Government might prevail even if there is no appeal.

It is no answer that the Government believes Judge Murphy was in error in ordering resentencing.[11] If the Government can appeal in this case, it can appeal every order of resentencing, right or wrong, and thereby postpone resentencing for months or even years as a result of the delay inherently involved in the appellate process. In the meantime, what is the effect on the prisoner? If the Government's argument prevails that this is a § 2255 proceeding (see II, *infra*), the prisoner is denied bail during the entire course of the appellate proceedings on the theory that the bail provisions of the criminal appeals statute do not apply. That is precisely the argument used by the

[11] This would not be the first case where an appellate court was in disagreement with a District Court and yet recognized that no appeal would lie. See, *e.g.*, *United States* v. *Williams*, 227 F.2d 149, 151 (4th Cir. 1955); *Collins* v. *United States*, 148 F.2d 338 (9th Cir. 1945).

Government in this very case to prevent Andrews and Donovan from being released on bail while the Government took its appeal (R. 71-73).[12] If the Government loses before the Court of Appeals, it can cause further delay by seeking certiorari from this Court; and if the Government wins before the Court of Appeals, the defendant then has the unpleasant choice of giving in or attempting to petition for certiorari himself—as in this case. It is not inappropriate to point out that if Andrews and Donovan are finally resentenced, the resentencing in all probability will not take place until two years after their resentencing was ordered. The Government's appeal has truly become "an instrument of harassment." See *DiBella* v. *United States*, *supra*, 369 U.S. at 129.

The Assistant United States Attorney told the District Court under oath that the Government must be allowed to appeal because otherwise it would be denied all appellate review of the legal issues involved (R. 54). Even assuming that this were true,[13] it is no ground for an interlocutory appeal. The same argument by the Government has been rejected time and again, by this and other courts.

For example, in *Carroll* v. *United States*, *supra*, 354 U.S. 394, the Government argued to this Court in its brief on the merits (pages 38, 40):

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[12] Most appropriate is this Court's observation in another case: "It is evident, for example, that the form of independence has been availed of on occasion to seek advantages conferred by the rules governing civil procedure, to the prejudice of proper administration of criminal proceedings." *DiBella* v. *United States*, *supra*, 369 U.S. at 129 n. 8.

[13] It is not necessary for petitioners to take a position at this time as to whether the Government could or could not appeal *following* resentencing. It should be noted, however, that the statement sworn to by the Assistant United States Attorney is diametrically opposed to that successfully taken by the Government in *United States* v. *Williamson*, 255 F.2d 512 (5th Cir. 1958), *cert. denied*, 358 U.S. 941 (1959).

> The decision rendered in the instant case provides a clear example of the impossibility not only of securing effective review except by the appeal here under attack, but of securing other review of any kind: for the Government obviously cannot appeal from either an acquittal or a conviction obtained without the suppressed evidence. * * *
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> * * * * * *
>
> If there were no reason other than that the only review of the District Court decision that could ever be had is the review procedure here employed, a ruling declaring that decision to be a final one would be amply justified.

But the Court rejected the argument with this statement: "Many interlocutory decisions of a trial court may be of grave importance to a litigant, yet are not amenable to appeal at the time entered, and some are never satisfactorily reviewable. In particular is this true of the Government in a criminal case * * *." 354 U.S. at 406.

In *DiBella* v. *United States*, *supra*, 369 U.S. 121, the Government attempted to appeal from an order suppressing evidence after the defendant was indicted in another jurisdiction. The Government's principal argument was that if it could not appeal the order, "it may be forever deprived of questioning the validity of the order. * * * [The Government] will not have another opportunity to obtain review."[14] The Court specifically ruled that this fact made no difference.

> Nor are the considerations against appealability made less compelling as to orders granting motions to

[14] The *DiBella* opinion encompassed two cases. One of them appeared in the Court of Appeals as *United States* v. *Koenig*, 290 F.2d 166 (5th Cir. 1961). The argument by the Government quoted above appears in the *Koenig* opinion at 171, 174.

> suppress by the fact that the Government has no later right to appeal when and if the loss of evidence forces dismissal of its case. * * * What disadvantage there be springs from the historic policy, over and above the constitutional protection against double jeopardy that denies the Government the right of appeal in criminal cases save as expressly authorized by statute. [369 U.S. at 130.]

And in *United States* v. *Rosenwasser*, 145 F.2d 1015 (9th Cir. 1944), the Court of Appeals said:

> The suggestion is made that a dismissal of the appeal herein might forever deprive the government of questioning the suppression rule because of the government's limited appellate rights in a criminal case. The reasoning is not persuasive, for the government's position herein is no less favorable than in the usual case of an adverse ruling on a point of evidence during a criminal trial, from which ruling the government would have no immediate, and possibly no future, right of appeal. [*Id.* at 1018, footnote deleted.]

These rulings are particularly impressive in view of the fact that the actual effect of the orders there involved was to put an end to the cases, whereas here the resentencing has yet to take place.

Even if petitioners' motions had been made under § 2255 —which they were not—the Government could not appeal, for this statute does not allow an appeal prior to finality. Section 2255 provides that an appeal may be taken "as from a *final* judgment on application for a writ of habeas corpus" (emphasis added), and only a "final" order in a habeas corpus proceeding may be appealed. 28 U.S.C. § 2253; *United States* v. *Hayman*, 342 U.S. 205, 209 n. 4 (1952); *Collins* v. *Miller*, 252 U.S. 364 (1920); *United*

States ex rel. Zdunic v. *Uhl*, 137 F.2d 858, 860 (2d Cir. 1943). The *Collins* case is very much in point here. The District Court had denied an application for a writ of habeas corpus based on the first of three affidavits but granted writs based on the last two affidavits and remanded the defendant to custody to await further hearings. The defendant attempted to appeal. This Court pointed out that the denial "would obviously have been a final judgment, if it had stood alone" (*id.* at 368), but since a further hearing was to be held based on the remaining affidavits, no appeal would lie. The rule as to finality "requires that the judgment to be appealable should be final not only as to all the parties, but as to the whole subject-matter and as to all the causes of action involved" (*id.* at 370).

Similarly, in *Poe* v. *Gladden*, 287 F.2d 249 (9th Cir. 1961), the Court said: "The order of September 28, 1959, here sought to be reviewed did not terminate the habeas corpus proceeding. There is still pending before the district court the application which was filed on June 4, 1958, at the same time that Poe filed the supplemental application which was denied. The district court may have intended to dispose of both applications in the order of that date. But the order does not so state, and it was not so understood by Poe" (*id.* at 250). The appeal was dismissed. And in *Kellner* v. *Metcalf*, 201 F.2d 838 (9th Cir. 1953), a petition for a writ of habeas corpus was granted, but no judgment was ever signed, filed or entered. The Court of Appeals held that no appeal would lie.

The point is again illustrated by *United States ex rel. D'Amico* v. *Bishopp*, 286 F.2d 320 (2d Cir.), *cert. denied sub nom. Farace* v. *D'Amico*, 366 U.S. 963 (1961). There, D'Amico filed for a writ of habeas corpus following extradition proceedings. The District Court held that the Commission had failed to make certain essential findings

and remanded the case to the Commissioner for the receipt of further evidence. The Italian Consul General attempted to appeal. The Court of Appeals dismissed the appeal on the ground that the order was entirely non-final and non-appealable.

The difference between a final order and a non-final order, *both* of which grant a § 2255 motion, is illustrated by a comparison of this case with *United States* v. *Williamson*, *supra*, 255 F.2d 512. There, a defendant was sentenced to 20 years on Count Two of an indictment and to eight years each on Counts Five and Six, the latter two sentences to run concurrently following the completion of the 20-year sentence. Subsequently, and in reliance on an opinion by this Court, the defendant moved under § 2255 to vacate the 20-year sentence as not being authorized by law. The District Court granted the motion and vacated the sentence on Count Two. As the Court of Appeals put it: "This left only the concurrent sentences under Counts 5 and 6 for the consummated larcenies. The result was that instead of sentences aggregating twenty-eight years, Williamson now stood sentenced for eight years only * * *." *Id.* at 513.

Nothing remained to be done by the District Court. The 20-year sentence had not been vacated preparatory to resentencing; it was simply vacated. Williamson remained under sentence of eight years. All proceedings in the District Court were concluded, and the only remaining act to be performed by anyone was for Williamson to serve his outstanding sentence. The Government, therefore, was allowed to appeal.

In the instant case, on the other hand, the sentences have been vacated and resentencing ordered. Neither Andrews nor Donovan is under any sentence at all at this time (except by virtue of the stays issued to allow

the Government to appeal). Resentencing has not taken place—no more here than if petitioners had never been sentenced at the conclusion of their trial. Clearly, the District Court's orders are not "final" in any sense contemplated by the statute and by this Court's decisions. Thus, what the Government is seeking is even more latitude to appeal than is granted private parties, whereas this Court has said it has less. See, *e.g.*, *Carroll* v. *United States*, *supra*, 354 U.S. at 400; *DiBella* v. *United States*, *supra*, 369 U.S. at 130.

"[T]here is no [general] authority today for interlocutory appeals" (*Carroll* v. *United States*, *supra*, 354 U.S. at 406), and the fact that this is particularly applicable to the Government in criminal cases unless specifically authorized by statute has been emphasized again and again. See *DiBella* v. *United States*, *supra*, 369 U.S. at 124, 131, 133.

Thus, in *United States* v. *Lias*, 173 F.2d 685 (4th Cir. 1949), the District Court vacated the defendant's judgment and sentence, and allowed him to plead not guilty and to stand trial. Before trial, the Government attempted to appeal. The Court of Appeals dismissed, holding that no appeal would lie except from "a final judgment which puts an end to the proceeding * * *" (*id.* at 688). Again, in *United States* v. *Shapiro*, 222 F.2d 836 (7th Cir. 1955), the Court of Appeals dismissed an appeal by the Government from an order setting aside a judgment of conviction and allowing the defendant to withdraw his plea of *nolo*. The order did not constitute a final, appealable judgment. *Id.* at 838.

In *United States* v. *Nardolillo*, 252 F.2d 755 (1st Cir. 1958), the District Court dismissed the indictment because the Government refused to produce certain reports. The Court of Appeals dismissed the Government's appeal. The

Court held that if the order was intended to dispose of the case, it did not fall within the appealable orders specified in 18 U.S.C. § 3731, and if the District Court intended to allow the Government to try the defendant again, the order was interlocutory, and there is no authority for interlocutory appeals in criminal cases. *Id.* at 757-758. And in both *United States* v. *Williams*, *supra*, 227 F.2d 149, and *United States* v. *Rosenwasser*, *supra*, 145 F.2d 1015, the Courts of Appeals dismissed appeals from orders suppressing evidence on the ground that the Government cannot appeal from interlocutory orders.

The inflexibility of the rule against interlocutory appeals is emphasized by the *single* exception to it sanctioned by this Court. In *Stack* v. *Boyle*, 342 U.S. 1 (1951), a defendant was allowed to appeal an order refusing to reduce excessive bail in advance of trial. The theory of the majority was that the District Court was without discretion to refuse to reduce such bail—a theory totally inapplicable to the facts of this case. See *Carroll* v. *United States*, *supra*, 354 U.S. at 403-406. Other exceptions—to the effect that motions for the suppression of evidence are appealable when filed prior to indictment or in a different district from that in which the trial will be held—were overruled in *DiBella* v. *United States*, *supra*, 369 U.S. 121.[15] *No* exception allowing the Government to appeal interlocutory orders is recognized in any of this Court's current de-

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[15] Overruling the decisions in *Perlman* v. *United States*, 247 U.S. 7 (1918), and *Burdeau* v. *McDowell*, 256 U.S. 465 (1921), and *dicta* in *Carroll* v. *United States*, *supra*, 354 U.S. 394; *Cobbledick* v. *United States*, *supra*, 309 U.S. 323; *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344 (1931); and *Cogen* v. *United States*, *supra*, 278 U.S. 221. The appeal allowed the defendant in *Korematsu* v. *United States*, 319 U.S. 432 (1943), was not interlocutory. The District Court had suspended the imposition of sentence and placed the defendant on probation, so that all court proceedings had come to an end.

cisions, and the history of the interlocutory-appeal rule has been one of restriction and not expansion. Certainly no expansion should be allowed when the subject matter of the order is as intimately tied in with the mainstream of the criminal trial as the sentence.[18]

It is not too much to say that if this Court sanctions the Government's appeal from Judge Murphy's orders, the entire run of cases denying appeals by *defendants* from interlocutory orders will be placed in doubt. Orders such as those:

—denying a motion to suppress evidence filed prior to an indictment. *DiBella* v. *United States*, *supra*, 369 U.S. 121.

—denying a motion to suppress evidence filed after indictment or information but prior to trial. *Cogen* v. *United States*, *supra*, 278 U.S. 221; *Saba* v. *United States*, 282 F.2d 255 (5th Cir. 1960), *cert. denied*, 369 U.S. 837 (1961); *Zacarias* v. *United States*, 261 F.2d 416 (5th Cir. 1958), *cert. denied*, 359 U.S. 935 (1959).

—denying a motion to dismiss an indictment. *United States* v. *Foster*, 278 F.2d 567, 569 (2d Cir. 1960), *cert. denied*, 364 U.S. 834 (1960); *United States* v. *Golden*, 239 F.2d 877 (2d Cir. 1956); *Atlantic Fishermen's Union* v. *United States*, 195 F.2d 1021 (1st Cir. 1952).

—transferring a case for trial from one jurisdiction to another. *Galloway* v. *United States*, 302 F.2d 457 (10th Cir. 1962); *United States* v. *Brown*, *supra*, 301 F.2d 664.

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[18] To paraphrase what this Court said in regard to suppression orders in *Carroll* v. *United States*, *supra*, 354 U.S. at 405, to fit an order granting resentencing in a criminal case "into the category of 'final decisions' requires a straining that is not permissible in the light of the principles and the history concerning criminal appeals, especially Government appeals * * *."

—denying a motion for a stay of criminal proceedings. *Dowling Bros. Distilling Co.* v. *United States*, 153 F.2d 353, 356 (6th Cir.), *cert. denied*, 328 U.S. 848 (1946); *United States* v. *Horns*, 147 F. 2d 57 (3d Cir. 1945).

—denying a motion for a new trial and in arrest of judgment prior to sentencing. *United States* v. *Knight*, *supra*, 162 F.2d 809.

—denying a motion for the appointment of an attorney pending a motion for a new trial. *Marion* v. *United States*, *supra*, 164 F.2d 158.

—deferring sentence on a criminal contempt charge. *Massengale* v. *United States*, *supra*, 278 F.2d at 345.

—overruling a motion for a judgment of acquittal and granting a retrial. *Northern* v. *United States*, *supra*, 300 F.2d 131; *Mack* v. *United States*, 274 F.2d 582 (D.C. Cir.), *cert. denied*, 361 U.S. 916 (1959); *Gilmore* v. *United States*, *supra*, 264 F.2d 44; *United States* v. *Swidler*, *supra*, 207 F.2d 47.

—revoking bail while a motion for a new trial is still pending. *Browder* v. *United States*, 168 F.2d 418 (5th Cir. 1948).

—entering a finding of guilty prior to sentencing. *In re Eskay*, *supra*, 122 F.2d at 824.

—suspending sentence but failing to place the defendant on probation. *Collins* v. *United States*, *supra*, 148 F.2d 338.

—denying a motion to nullify the defendant's election not to serve his sentence. *Shelton* v. *United States*, 223 F.2d 249 (5th Cir. 1955).

—denying a motion to require the Government to produce certain records following conviction. *Kimes* v. *United States*, 251 F.2d 458 (5th Cir. 1958).

No amount of sophistry can delineate Judge Murphy's orders as anything but interlocutory. Whether his orders be called civil or criminal in nature, the fact remains that petitioners' prior sentences have been vacated, the petitioners still await resentencing, and under established law the Government cannot appeal.

II.

The District Court's orders, even if considered final, were not appealable by the Government in this criminal case.

"In the absence of express statutory authority no appeal may be taken on behalf of the United States in any criminal case."[17] The statute giving that authority, 18 U.S.C. § 3731,[18] must be strictly construed,[19] because "appeals by the Government in criminal cases are something unusual, exceptional, not favored."[20] It is not necessary, however, for petitioners to discuss this statute in detail or to interpret it strictly in this instance, because neither the Government nor the Court of Appeals claims that the Government's appeals from Judge Murphy's orders fall within § 3731.

Even "final" orders—in the sense that they have the effect of terminating the proceeding—cannot be appealed by the Government in criminal cases unless they come within the language of § 3731. For example, in *United States* v. *Pack*, 247 F.2d 168 (3d Cir. 1957), the District Court dis-

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[17] *United States* v. *Burroughs*, 289 U.S. 159, 161 (1933). See also *United States* v. *Sanges*, 144 U.S. 310 (1892).

[18] This section is set out in full in Appendix A to this brief.

[19] *United States* v. *Borden Co.*, 308 U.S. 188, 192 (1939); *DiBella* v. *United States*, *supra*, 369 U.S. at 130.

[20] *Carroll* v. *United States*, *supra*, 354 U.S. at 400. See also *United States* v. *Nardolillo*, *supra*, 252 F.2d at 757.

missed indictments for want of prosecution, and the Government appealed. The Court of Appeals held that no appeal would lie because none was authorized by § 3731. The same result obtained in *United States* v. *Apex Distributing Co.*, 270 F.2d 747, 751-755 (9th Cir. 1959), and *United States* v. *Nardolillo*, *supra*, 252 F.2d at 757, 758, where indictments were dismissed because the Government in each instance refused to produce certain documents prior to trial, and in *Umbriaco* v. *United States*, 258 F.2d 625 (9th Cir. 1958), where a conviction on one count was set aside for insufficient evidence.

In *United States* v. *Lane*, 284 F.2d 935 (9th Cir. 1960), a defendant found guilty of importing narcotics was given a suspended sentence and placed on probation. The District Court denied the Government's motion to correct the sentence under Rule 35, and the Government appealed both from the original judgment and sentence and from the denial of the Rule 35 motion. The Court of Appeals dismissed both appeals on the ground that neither was sanctioned by § 3731.[21] See also *United States* v. *Gibbs*, 285 F.2d 225 (9th Cir. 1960).

In *DiBella* v. *United States*, *supra*, 369 U.S. at 130, this Court partially relied upon § 3731 in denying the Government the right to appeal from an order suppressing evidence on a motion filed prior to indictment, and in *Carroll* v. *United States*, *supra*, 354 U.S. 394, it relied upon § 3731 extensively in denying the Government the right to appeal from an order suppressing evidence after indictment, even

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[21] In the *Lane* case, the Government also specifically sought and was granted a writ of mandamus on the ground that probation was prohibited by the narcotics statute. See also *La Buy* v. *Howes Leather Co.*, 352 U.S. 249 (1957); *United States* v. *Smith*, 331 U.S. 469 (1947). *Cf. Fong Foo* v. *United States*, 369 U.S. 141 (1962). The Government, of course, did not seek mandamus in the instant case.

though the Government asserted that without the evidence it would have to dismiss the indictment.

The Government seeks to avoid the restrictions of § 3731 by arguing that petitioners' motions were not part of their criminal case. This argument will not stand analysis.

In *United States* v. *Wallace & Tiernan Co.*, 336 U.S. 793 (1949), the District Court during a criminal case barred the use of certain evidence by the Government, which then brought a civil suit in which it attempted to introduce the same evidence. The defendants argued that by failing to appeal the prior order, the Government became barred by *res judicata* from further use of the evidence, to which the Government replied that the prior order had been "interlocutory and therefore not appealable" (*id.* at 801, n. 3). The answer to the problem, said this Court, depended upon whether "the proceeding was handled by the [District] court as an independent plenary proceeding or one to suppress evidence at a forthcoming trial" (*id.* at 802). "The motion, court opinion, and court order bore the title and number (6070) of the criminal information proceeding. During the argument colloquies took place between court and counsel which emphasized that the motion related to 'Criminal 6070'" (*ibid.*). Therefore, the prior order had been entered as part of the criminal case and was no bar to the use of the evidence in a civil case.[22]

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[22] See also *United States* v. *Shapiro*, *supra*, 222 F.2d at 839: "We think there can be no real doubt but that in the instant case the proceeding to vacate the judgment and to permit the withdrawal of the defendant's plea of *nolo contendere* was a step in the criminal case. It was filed as authorized by Rule 32 (d) of the Federal Rules of Criminal Procedure. The motion was filed in the same court where the defendant was originally convicted and docketed under the same criminal case number as the original action, No. 345-Crim. T. The hearing on the motion was then held and the matter determined by the same trial judge who had heard the original criminal case and who had entered the original judg-

And so here, too, we look to the record below to determine how petitioners' motions were presented, processed, handled and treated. Donovan was the first to file. He specifically requested that his motion be treated as a Rule 35 motion (R. 37, 38, 39). The clerk so treated it (R. 9). The Government conceded that it was a Rule 35 motion (R. 41, 45). Judge Murphy granted the motion as tendered (R. 40). The Government conceded that Judge Murphy had granted relief "under Rule 35" (R. 48). In filing for a stay, an Assistant United States Attorney pointed out in a sworn affidavit that "Under Rule 37(a)(2), Federal Rules of Criminal Procedure, an appeal by the Government may be taken within 30 days after the entry of judgment or order appealed from" (R. 47), and the Government did in fact appeal within the 30 days applicable to criminal appeals (R. 10).

When Andrews discovered that Donovan was to be resentenced, he wrote Judge Murphy requesting the same treatment (R. 49-50). He made no mention of either Rule 35 or 28 U.S.C. § 2255. Nor did the clerk in filing the motion (R. 10), or Judge Murphy in granting it (R. 58). Moreover, the Government conceded that "The factual and legal posture of this application therefore is identical to the similar motion of Robert L. Donovan" (R. 51). Nevertheless, completely on its own, the Government suddenly began designating Andrews' application as one "in the nature of" a § 2255 petition (R. 51). It is interesting that in Andrews' case, even though the Government continued in its notice of appeal to refer to § 2255 (R. 52), it nevertheless filed the notice within the 30 days allotted for criminal ap-

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ment of conviction." In both *Cogen* v. *United States*, *supra*, 278 U.S. at 225, and *Carroll* v. *United States*, *supra*, 354 U.S. at 404 n. 17, this Court pointed out that the "essential character and the circumstances under which it is made" determine whether a motion is part of the criminal proceeding.

peals (R. 10) and designated the notice with a criminal docket number (R. 52).

As a matter of fact, *every paper filed in this case in the District Court in regard to either petitioner and relating in any way to the question of sentencing or resentencing, including all papers filed by the Government, bore the original criminal docket number: C 149-191* (R. 1, 20, 33, 34, 35, 37, 38, 39, 40, 41, 46, 47, 48, 49, 50, 52, 53, 54, 56, 57, 59, 60).[23]

Surely if, as the Court of Appeals said, "These motions were independent motions and treatable as such" (R. 77), it is rather odd that the petitioners, the District Court, and even the Government (until very late in the game) all failed to treat them as such and in fact treated them as something very different.

Petitioners' motions were quite properly treated as Rule 35 motions, because Rule 35 was the correct method of attacking the sentences. Rule 35 provides that "The court may correct an illegal sentence at any time," and a sentence is equally as illegal if made in violation of law as it is if made in excess of the confinement specified in the governing statute. *Green* v. *United States*, *supra*, 365 U.S. 301, clearly contemplated that Rule 35 is the proper remedy when a violation of Rule 32(a) is one of the grounds of attack, because the Court held that the defendant "failed to meet his burden" of proof under Rule 35 (*id.* at 305), rather than that the District Court lacked jurisdiction over the complaint. Moreover, the Court rejected an attack on an improper jury charge with the observation that "Rule 35

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[23] This Court has pointed out that a Rule 35 motion "is a step in the criminal case and not, like habeas corpus [and therefore like a § 2255 proceeding] where relief is sought *in a separate case and record*, the beginning of a separate civil proceeding." *United States* v. *Morgan*, 346 U.S. 502, 505 n. 4 (1954) (emphasis added).

does not encompass all claims that could be made by direct appeal attacking the conviction, but rather is limited to challenges that involve the legality of the sentence itself" (*id.* at 306 n. 3).

It is "the sentence itself" and not the conviction that petitioners attack. And they do it on the basis of what the record shows and not in reliance on matters *dehors* the record. See *Heflin* v. *United States*, 358 U.S. 415 (1959). It is quite true that there is at least an implication in this Court's opinion in *Hill* v. *United States*, *supra*, 368 U.S. 424, that § 2255 rather than Rule 35 is the proper remedy here. But with great respect we suggest that this language in *Hill* fails to take into consideration the true nature of § 2255 and the consequences which would flow from its use in this type of proceeding.

Section 2255 is strictly limited by its own terms to "A prisoner in custody under sentence of a court established by Act of Congress *claiming the right to be released* * * * " (emphasis added), and this Court has held that a proceeding under § 2255 "is an independent and collateral inquiry into the validity of the *conviction*." *United States* v. *Hayman*, *supra*, 342 U.S. at 222 (emphasis added). The cases distinguishing § 2255 from Rule 35 repeatedly state that § 2255 involves a collateral attack upon the *judgment* by reason of matters *dehors* the record, whereas Rule 35 presupposes a conviction and affords a procedure for correcting a sentence shown by the record to be improper. *E.g.*, *Duggins* v. *United States*, 240 F.2d 479, 483-484 (6th Cir. 1957); *Cook* v. *United States*, 171 F.2d 567, 570-571 (1st Cir. 1948), *cert. denied*, 336 U.S. 926 (1949); *United States* v. *Rader*, 185 F. Supp. 224, 228-229 (W.D. Ark. 1960), *aff'd*, 288 F.2d 452 (8th Cir.), *cert. denied*, 368 U.S. 851 (1961).

As already pointed out, petitioners' attack is not on their judgments but on their sentences, and they do not rely upon

anything *dehors* the record (see III, *infra*). Their sentences have been shown to be invalid and improper on the face of the record, as evidenced by the fact that Judge Murphy granted their motions without taking evidence. Petitioners do not claim the right to be released (except by way of suspended sentences and probation). Their claim is that their sentences are invalid, and that they are entitled to be sentenced properly and in accordance with law.

The practical difficulties involved in treating an attack on a sentence as a § 2255 proceeding are enormous. For example, a § 2255 proceeding is independent of and separate from the criminal case. It involves a separate record. The result is that not all circumstances which bear on the sentence are necessarily included in the § 2255 record, either at the District Court level or on review by the appellate court, and the § 2255 motion is not made part of the criminal record. See *United States* v. *Hayman*, *supra*, 342 U.S. at 221 n. 36; *Taylor* v. *United States*, 282 F.2d 16, 23 (8th Cir. 1960); *Bruno* v. *United States*, 180 F.2d 393, 395 (D.C. Cir. 1950); *Burleson* v. *United States*, 205 F. Supp. 331, 333 n. 5 (W.D. Mo. 1962). *Cf. Edwards* v. *United States*, 256 F.2d 885 (D.C. Cir. 1958).

Moreover, if Rule 35 is eliminated as a method of attacking a sentence under the circumstances disclosed by this record, a whole range of illegal sentences will be made immune from collateral attack. This is so because only a sentence which is actually being served can be corrected under § 2255. A defendant cannot correct a sentence under § 2255 if he is serving the first of two consecutive sentences and it is the second sentence he is attacking;[24] if he

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[24] *Heflin* v. *United States*, *supra*, 358 U.S. at 420; *Crow* v. *United States*, 186 F.2d 704 (9th Cir. 1950); *United States* v. *Greco*, 141 F. Supp. 829 (M.D. Pa. 1956); *United States* v. *Young*, 93 F. Supp. 76, 78 (W.D. Wash. 1950), *appeal dismissed*, 190 F.2d 558 (9th Cir. 1951).

is serving a sentence which is concurrent with the sentence he is attacking;[25] if he is in custody under a state sentence and is attacking a federal sentence;[26] or if he has already served the sentence he is attacking.[27] "As the law now stands, the remedies open to a convict who is not in custody are limited to an appeal from the judgment, and to a motion made under Rules 33, 34 and 35 * * *." *United States* v. *Bradford, supra* n. 27, 194 F.2d at 201.

Even if § 2255 were technically available as an alternative remedy to Rule 35,[28] it should not be used. This Court has pointed out that "While habeas corpus is an appropriate remedy for one held in custody in violation of the Constitution * * *, the District Court should withhold relief in this collateral habeas corpus action where an adequate remedy available in the criminal proceeding has not been exhausted." *Stack* v. *Boyle, supra*, 342 U.S. at 6-7. The

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[25] *Duggins* v. *United States, supra*, 240 F.2d at 482-483; *Winhoven* v. *United States*, 209 F.2d 417, 418 (9th Cir. 1953). See *McNally* v. *Hill*, 293 U.S. 131 (1934).

[26] *Booth* v. *United States*, 209 F.2d 183 (9th Cir. 1953), *cert. denied*, 347 U.S. 923 (1954); *United States* v. *Kerschman*, 201 F.2d 682 (7th Cir. 1953); *United States* v. *Lavelle*, 194 F.2d 202 (2d Cir. 1952).

[27] *Parker* v. *Ellis*, 362 U.S. 574 (1960) (and cases there cited); *Fooshee* v. *United States*, 203 F.2d 247 (5th Cir. 1953); *United States* v. *Bradford*, 194 F.2d 197, 200 (2d Cir.), *cert. denied*, 343 U.S. 979 (1952); *Lopez* v. *United States*, 186 F.2d 707 (9th Cir. 1950).

[28] The fact that Rule 35 and § 2255 have been used interchangeably at least in some instances is illustrated by *Prince* v. *United States*, 352 U.S. 322 (1957), and *United States* v. *Williamson, supra*, 255 F.2d 512. In *Prince*, the defendant attacked his sentence under Rule 35 and was upheld on appeal. 352 U.S. at 324. In *Williamson*, the defendant attacked his sentence under § 2255 on exactly the same ground and in reliance upon *Prince*, and he was also upheld, both by the trial court and—on this point—by the appellate court. 255 F.2d at 513-514. See also *Heflin* v. *United States, supra*, 358 U.S. 415.

same applies to § 2255. This remedy should not be used to replace or defeat another remedy available as part of the criminal proceeding itself. Rather, § 2255, like habeas corpus, should be used when all other remedies fail. Here, Rule 35 is available and proper as a means of correcting the wrong that has been done.

The Government has attempted before to treat as "severable," or as "independent," matters which were really part of the criminal proceeding, and this Court has rejected the effort. See, *e.g.*, *DiBella* v. *United States*, *supra*, 369 U.S. at 125-127, 129, 132-133; *Carroll* v. *United States*, *supra*, 354 U.S. at 394-408. In no small sense, there is no criminal proceeding unless there is sentence. There could hardly be a more intimate part of the criminal proceeding than the sentence. To treat it as an ancillary matter would be to reject reality in favor of neither form nor substance.

Rule 35 was the proper remedy, resentencing was ordered under Rule 35, and the orders of resentencing were thus part of the criminal proceeding. The Government, therefore, was without statutory authority to appeal.

III.

Even assuming that the Government could appeal, the District Court was correct in holding that petitioners are entitled to be resentenced.

In this section of the brief, we assume for purposes of argument that the Court of Appeals properly had jurisdiction over the Government's appeals. The Court of Appeals was nevertheless erroneous in its holding that petitioners are not entitled to be resentenced, for the District Court's resentencing orders are amply supported by the record.

In *Hill* v. *United States*, *supra*, 368 U.S. 424, this Court held that the simple failure to comply with the formal re-

quirements of Rule 32(a) does not justify a collateral attack on a sentence by way of Rule 35 or 28 U.S.C. § 2255. At the same time, however, this Court was careful to note repeatedly that it was dealing *only* with a failure by the District Court explicitly to afford a defendant an opportunity to make a statement, and that it was *not* passing upon a situation where such a failure was accompanied by "aggravating circumstances."[29]

Similarly, in *Machibroda* v. *United States*, *supra*, 368 U.S. at 489, the Court ruled: "For the reasons stated in *Hill* v. *United States*, *ante*, p. 424, we hold that the failure of the District Court *specifically* to inquire at the time of

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[29] This Court said, for example: "The only issue presented is whether a district court's failure *explicitly* to afford a defendant an opportunity to make a statement at the time of sentencing furnishes, *without more*, grounds for a successful collateral attack upon the judgment and sentence" (368 U.S. at 426); "We hold that the failure to follow the *formal* requirements of Rule 32(a) is not *of itself* an error that can be raised by collateral attack, and we accordingly affirm the judgment of the Court of Appeals" (*ibid.*); "The failure of a trial court to ask a defendant represented by an attorney whether he has anything to say before sentence is imposed is not *of itself* an error of the character or magnitude cognizable under a writ of habeas corpus" (*id.* at 428); "It is to be noted that we are not dealing here with a case where the defendant was affirmatively denied an opportunity to speak during the hearing at which his sentence was imposed. Nor is it suggested that in imposing the sentence the District Judge was either misinformed or uninformed as to any relevant circumstances. Indeed, there is no claim that the defendant would have had anything at all to say if he had been formally invited to speak. Whether § 2255 relief would be available if a violation of Rule 32(a) occurred *in the context of other aggravating circumstances* is a question we therefore do not consider. We decide only that such collateral relief is not available when *all* that is shown is a failure to comply with the *formal* requirements of the Rule" (*id.* at 429). (All emphases added.)

It is thus clear that under some circumstances a collateral attack based upon a failure to comply with Rule 32(a) is permissible. This has been the interpretation accorded the *Hill* opinion by the Fourth Circuit Court of Appeals. *United States* v. *Taylor*, 303 F.2d 165, 167-168 (4th Cir. 1962).

sentencing whether the petitioner *personally* wished to make a statement in his own behalf is not *of itself* an error that can be raised by motion under 28 U.S.C. § 2255 or Rule 35 of the Federal Rules of Criminal Procedure" (emphasis added).[30]

In the case of Donovan and Andrews, however, there can be no question but that the right of allocution was denied both at the original sentencing and at the resentencing,[31] and a number of aggravating circumstances accompanied the denial of that right.

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[30] The Transcript of Record in the *Machibroda* case shows (pp. 42-43) that the defendant's attorney was specifically asked if he had anything to say:

> The Court: Does counsel for the defendant have anything to say in this matter?
>
> Mr. Schuchmann: No, Your Honor, I believe this is my fourth appearance here with the defendant.
>
> The Court: That is correct. Mr. Machibroda, I have had a complete report in your case since you were brought over here and entered your pleas.

The Court then proceeded to discuss the crime and the report, and to sentence the defendant.

[31] See Appendix B for the original sentencing and R. 20-33 for the resentencing. Following his resentencing, Andrews sought from the District Court a nullification of his election not to commence the service of his sentence and an order declaring that his sentence was effective from the date on which he was originally sentenced in 1954. The Government defeated his claims by obtaining a ruling that the Court of Appeals had never "vacated" his original sentence, and that Judge Walsh never "resentenced" him at all but merely ordered that his prior sentence remain unchanged. See *United States* v. *Andrews*, 170 F. Supp. 380, 382 (S.D.N.Y. 1958), *aff'd*, 263 F.2d 608 (2d Cir.), *cert. denied*, 360 U.S. 904 (1959). In opposing Donovan's motion for resentencing before Judge Murphy, however, the Government found it advantageous to argue quite to the contrary. An Assistant United States Attorney stated in a sworn affidavit: "Although petitioner attacks the validity of both the 1954 sentencing and the 1957 resentencing it appears clear that he is presently incarcerated solely on the basis of the judgment of conviction entered by Judge Walsh on May 29, 1957. Since petitioner was resentenced at that time, it is unnecessary to consider

(a) The most obvious such circumstance—one reaching constitutional proportions—was that Donovan, Andrews and one of Donovan's attorneys were not even present during a crucial part of the resentencing procedure.

As already noted in the statement of facts, the resentencing was to have taken place on May 15, 1957, but was deferred for five days at the request of Mr. Friedman, an attorney representing all three defendants, so that he could prepare a brief on the power of the District Court to impose less than 25-year sentences (R. 20-21). No such brief was prepared (R. 21). Instead, Mr. Friedman and the Assistant United States Attorney, Mr. Matthews, appeared before the Court on May 20 and carried on extended legal arguments dealing with the power of the Court to impose various sentences (R. 21-25). The record clearly shows that Donovan, Andrews, and Donovan's separate attorney, Mr. Healey, were absent from the courtroom during these arguments (R. 21, 25, 26).

After a recess the two defendants appeared, and Mr. Matthews presented the Government's version of the crime (R. 25-26). The record indicates that Mr. Healey did not appear until *after* this presentation had been made (see R. 26). Friedman and Healey then spoke, but neither covered in their remarks the same argument that had been made earlier out of the presence of Healey and the defendants (R. 26-29).

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any possible flaws in the original sentencing" (R. 42). The Court of Appeals seemed to agree, because it held in its opinion below that both Andrews and Donovan were "resentenced" in 1957 (R. 75). In view of the fact that petitioners were denied their right of allocution at both their original sentencing and their resentencing, and in further view of the fact that Judge Murphy *vacated* their sentences—regardless of when imposed—the point would seem to be more interesting as a lesson in Government ambivalence than important in any determination of this case.

The cases are clear that a defendant is entitled under the Due Process Clause of the Fifth Amendment and under Federal Rule of Criminal Procedure 43 to be present at every stage of the proceeding against him. For example, as early as 1884 this Court said:

> Such being the relation which the citizen holds to the public, and the object of punishment for public wrongs, the Legislature has deemed it essential to the protection of one whose life or liberty is involved in a prosecution for felony, that he shall be personally present at the trial, that is, at every stage of the trial when his substantial rights may be affected by the proceedings against him. [*Hopt* v. *People of Utah*, 110 U.S. 262, 264 (1884).[32]]

The rule applies to every stage of the proceeding after indictment,[33] and it has specifically been applied to the sentencing, or resentencing, procedure. Thus, in *Pollard* v. *United States*, *supra*, 352 U.S. 354, the defendant was absent when the judgment and order were entered suspending the imposition of sentence and placing him on probation. The Government and every member of this Court conceded that the judgment and order were invalid. *Id.* at 356, 360, 366 n. 3. In *Anderson* v. *Denver*, 265 Fed. 3 (8th Cir. 1920), the court held a sentence subject to collateral attack by

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[32] See also *Ball* v. *United States*, 140 U.S. 118, 131, 132 (1891); *Schwab* v. *Berggren*, 143 U.S. 442, 448 (1892); *Dowdell* v. *United States*, 221 U.S. 325, 331 (1911); *Evans* v. *United States*, 284 F.2d 393, 395 (6th Cir. 1960); *United States* v. *Brest*, 23 F.R.D. 103, 106 (W.D. Pa. 1958).

[33] *E.g.*, *Lewis* v. *United States*, 146 U.S. 370, 372 (1892) ("after indictment found, nothing shall be done in the absence of the prisoner"); *Diaz* v. *United States*, 223 U.S. 442, 455 (1912); *Price* v. *Zerbst*, 268 Fed. 72, 74 (N.D. Ga. 1920) (it is a leading principle in United States courts that "after indictment nothing should be done in the absence of the prisoner").

way of habeas corpus because the defendant had not been present. Said the court, quoting a constitutional text:

> "In cases of felony, where the prisoner's life or liberty is in peril, he has the right to be present, and must be present, during the whole of the trial, and until the final judgment. If he be absent, either in prison or by escape, there is a want of jurisdiction over the person, and the court cannot proceed with the trial, or receive the verdict, or pronounce the final judgment." [*Id.* at 5-6.]

In *Cook* v. *United States*, 171 F.2d 567, 569 (1st Cir. 1948), *cert. denied*, 336 U.S. 926 (1949), the Court of Appeals vacated an order which was entered in the defendant's absence and which added a fine to his sentence, even though it was the defendant himself who had requested that the fine be added. Again, in *Downey* v. *United States*, 91 F.2d 223 (D.C. Cir. 1937), the court recognized that the defendant's presence was necessary at proceedings to determine whether his sentences were to run concurrently or consecutively. The Court stated:

> Proceedings in the absence of the appellant to correct the record would have been improper, since the ultimate question involved, the extent of valid imprisonment to which he might be subjected, was one of vital legal interest to him. [*Id.* at 227.]

Similarly, in *Montgomery* v. *United States*, 134 F.2d 1, 2 (8th Cir. 1943), the Court of Appeals vacated orders of the District Court which amended court records to show that sentences were to run consecutively and which were entered in the absence of the defendants, and in *Crowe* v. *United States*, 200 F.2d 526 (6th Cir. 1952), the Court of Appeals held invalid a District Court order which amended

and modified a probation order in the absence of the defendant. In the latter case, the Court of Appeals ruled: "A leading principle that pervades the entire law of criminal procedure is that, after indictment is found, nothing shall be done in the absence of the prisoner." *Id.* at 528.

In the instant case, the absence of petitioners was particularly serious, and it bore directly on their right of allocution. If they were not told about the argument which took place in their absence, they of course had no opportunity to refute, rebut, correct or enlarge upon what was said either in their own behalf or by the Government. On the other hand, if they were informed that an argument had taken place in their absence, they may very well have assumed that much was said on their behalf which in fact was not said. It may be, in fact, that knowledge of an argument out of their presence dissuaded them from speaking up for fear of repeating or contradicting something that had already been said on their behalf.

The absence of Mr. Healey was also particularly serious, because even though Mr. Friedman said he was representing all three defendants,[34] it is worth noting that he did not speak for Donovan in Healey's presence (see R. 26-28), and he nowhere mentioned Donovan in Healey's absence (R. 21-24), though he conceded that the "defendants are differently situated" (R. 23). Healey never had an opportunity to argue the law, as Friedman had done, but rather confined himself to a plea for mercy (R. 28-30). He nowhere mentioned the argument Friedman had made to the effect that the Court should give a light sentence on Count One and suspend sentence on Count Two; instead, he simply asked the Court to place Donovan on probation (R. 29, 30).

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[34] Mr. Friedman had represented only Mr. Cohen at the trial (see list of appearances in Original Transcript on file with this Court).

Clearly, petitioners were seriously prejudiced when an important part of the sentencing procedure—a part so vital that it had been postponed five days to allow Friedman a chance to prepare for it—was held out of their presence and out of the presence of Donovan's attorney. A right to be present at the imposition of sentence is meaningless unless a defendant has been present at each stage of the proceedings designed to determine what that sentence shall be. The absence of petitioners and Healey was more than an "aggravating circumstance"; it was the denial of a fundamental right.

(b) The judge who resentenced petitioners had a serious misconception as to the facts of the crime.

The trial had been held almost two and a half years prior to the resentencing and had lasted five days (R. 2, 20). By the time of the resentencing in 1957, Judge Walsh had developed the idea that Andrews was on the truck with Donovan when the crime was committed (R. 31, 32), whereas actually Andrews was away from the truck and unarmed during the holdup. *Supra*, n. 6. Clearly, if Andrews had been given an opportunity to speak in his own behalf, he would have corrected this error and placed himself more nearly in the category of Cohen, who received a suspended sentence, than in that of Donovan, who received a sentence of 25 years (R. 30-34). Misinformation on the part of the District Judge was one of the factors specifically cited by this Court in *Hill* v. *United States*, *supra*, 368 U.S. at 429, as possibly calling for a different result than prevailed there.

(c) Unlike the record in *Green* v. *United States*, *supra*, 365 U.S. 301, the record here directly refutes any inference that either Andrews or Donovan was asked whether he had anything to say in his own behalf. In *Green*, the District

Court asked, "Did you want to say something?," and although the defendant's attorney answered, a majority of this Court felt that the question may well have been directed to the defendant. 365 U.S. at 304-305. Here, however, the only question asked by the District Court even remotely in point was, "Is there anything you want to say now?," and this question was answered not by the defendants or their attorneys but by the Assistant United States Attorney (R. 25).[35]

The above facts, combined with others,[36] quite clearly make out a case requiring resentencing. Particularly apt is the observance in *Green* v. *United States*, *supra*, 365 U.S. at 304, that "The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself"—a statement so obvi-

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[35] With all due deference to the Court of Appeals, we are obliged to point out that the opinion below misstates the facts in this regard. The Court of Appeals opinion states: "The undisputed facts are that when the case was called for sentence Donovan was present with his retained counsel; that the court inquired: 'Is there anything you want to say now?'; and that thereupon in the presence of Donovan *his counsel* addressed the court at length" (R. 75, emphasis added). This simply is not so. The record clearly shows that Mr. Matthews, the Assistant United States Attorney, answered the District Court's question, and that Donovan's attorney did not speak until Matthews had concluded. It is not clear whether the Court of Appeals thought Matthews was Donovan's attorney, or whether it was simply adopting a similar statement of the facts submitted by an Assistant United States Attorney in his "Affidavit in Opposition to Motion for Resentencing," filed June 19, 1961 (R. 41-45; see particularly R. 43-44).

[36] For example, the petitioners had been denied their right of allocution at the original sentencing (Appendix B), so that while the District Court may well have felt that they had already said everything there was to say in their own behalf, this was in fact their first opportunity to speak.

Also, Donovan had a criminal record (R. 28), so it was particularly important, as the four dissenters pointed out in *Hill* v. *United States*, *supra*, 368 U.S. at 434-435, that he be allowed to speak to his prior convictions.

ously true that three courts of appeals[37] and the Government[38] were persuaded, until *Hill* was decided, that Rule 32(a) guaranteed a right to speak that was personal to the defendant. Here it was particularly important for the defendants to speak for themselves, because the District Court had before it at least one presentence report (R. 23, 26), which was required to show, in addition to any prior criminal record, "such information about [the defendant's] characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence, or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the Court" (Federal Rule of Criminal Procedure 32(c)(2)). The record indicates that counsel for neither side had seen this report (R. 23, 26). It was therefore essential that the men from whom much of the information in the report undoubtedly was drawn be allowed to speak from their own personal knowledge of the salient facts. That the District Court might well have been persuaded by what they had to say is indicated by the fact that the third defendant, Cohen, who was described to the jury by the prosecutor as "worse than the other two" defendants (Original Transcript on file with this Court, 662), was placed on probation (R. 31).

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[37] *United States* v. *Byars*, 290 F.2d 515 (6th Cir.), *cert. denied*, 368 U.S. 905 (1961); *Domenica* v. *United States*, 292 F.2d 483 (1st Cir. 1961); *Jenkins* v. *United States*, 293 F.2d 96 (5th Cir. 1961), *cert. denied*, 370 U.S. 928 (1962). *Cf.* the post-*Hill* case of *United States* v. *Bebik*, 302 F.2d 335 (4th Cir. 1962).

[38] *Van Hook* v. *United States*, 365 U.S. 609 (1961); Government's Memorandum in Reply to Petition for Certiorari, p. 12. The colloquy that occurred at sentencing in *Van Hook* is quoted in the Appendix certified to the Court in that case, pp. 31-32.

CONCLUSION

The Court must remember that in this case the Government is not attempting to appeal a lesser sentence, an illegal sentence, a failure to sentence, or an acquittal. It is attempting to appeal the *fact* of resentencing, in advance of the event. Such an appeal finds support nowhere in the cases, and the Court of Appeals has cited none. An affirmance by this Court not only would mark a radical departure from prior case law but would throw all of the prior "finality" cases into doubt.

In the meantime, one of the most important rights in the criminal field—the right to be sentenced properly and in accordance with law—is being denied these petitioners, and the amount of time they could be spending on probation rehabilitating themselves is diminishing. The judgment of the Court of Appeals should be promptly reversed.

Respectfully submitted,

E. Barrett Prettyman, Jr.
800 Colorado Building
Washington 5, D. C.
Attorney for Petitioners
Appointed by the Court

APPENDIX A

Constitutional Provision, Statutes and Rules Involved

Amendment V, United States Constitution

No person shall * * * be deprived of life, liberty or property, without due process of law * * *.

62 Stat. 797, 18 U.S.C.A. § 2114

Whoever assaults any person having lawful charge, control, or custody of any mail matter or of any money or other property of the United States, with intent to rob, steal, or purloin such mail matter, money, or other property of the United States, or robs any such person of mail matter, or of any money, or other property of the United States, shall, for the first offense, be imprisoned not more than ten years; and if in effecting or attempting to effect such robbery he wounds the person having custody of such mail, money, or other property of the United States, or puts his life in jeopardy by the use of a dangerous weapon, or for a subsequent offense, shall be imprisoned twenty-five years.

72 Stat. 701, 18 U.S.C.A. § 371

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

62 Stat. 967, as amended, 28 U.S.C.A. § 2255

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that

the remedy by motion is inadequate or ineffective to test the legality of his detention.

62 Stat. 844, as amended, 18 U.S.C.A. § 3731

Appeal by United States.

An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

From a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy.

An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section.

From a decision arresting a judgment of conviction except where a direct appeal to the Supreme Court of the United States is provided by this section.

The appeal in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted.

Pending the prosecution and determination of the appeal in the foregoing instances, the defendant shall be admitted to bail on his own recognizance.

If an appeal shall be taken, pursuant to this section, to the Supreme Court of the United States which, in the opin-

ion of that Court, should have been taken to a court of appeals, the Supreme Court shall remand the case to the court of appeals, which shall then have jurisdiction to hear and determine the same as if the appeal had been taken to that court in the first instance.

If an appeal shall be taken pursuant to this section to any court of appeals, which, in the opinion of such court, should have been taken directly to the Supreme Court of the United States, such court shall certify the case to the Supreme Court of the United States, which shall thereupon have jurisdiction to hear and determine the case to the same extent as if an appeal had been taken directly to that Court.

Rule 32, Federal Rules of Criminal Procedure

Sentence and Judgment.

(a) SENTENCE. Sentence shall be imposed without unreasonable delay. Pending sentence the court may commit the defendant or continue or alter the bail. Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment.

(b) JUDGMENT. A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The judgment shall be signed by the judge and entered by the clerk.

(c) PRESENTENCE INVESTIGATION.

(1) *When Made.* The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless the court otherwise directs. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty.

(2) *Report.* The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial

condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the Court.

(d) WITHDRAWAL OF PLEA OF GUILTY. A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

(e) PROBATION. After conviction of an offense not punishable by death or by life imprisonment, the defendant may be placed on probation as provided by law.

Rule 35, Federal Rules of Criminal Procedure

Correction or Reduction of Sentence. The court may correct an illegal sentence at any time. The court may reduce a sentence within 60 days after the sentence is imposed, or within 60 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 60 days after receipt of an order of the Supreme Court denying an application for a writ of certiorari.

Rule 43, Federal Rules of Criminal Procedure

Presence of the Defendant.

The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules. In prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the return of the verdict. A corporation may appear by counsel for all purposes. In prosecutions for offenses punishable by fine or by imprisonment

for not more than one year or both, the court, with the written consent of the defendant, may permit arraignment, plea, trial and imposition of sentence in the defendant's absence. The defendant's presence is not required at a reduction of sentence under Rule 35.

APPENDIX B

Proceedings Before Judge Walsh on December 31, 1954, Original Transcript on File With This Court, Pages 647-650a

The Clerk: Ladies and gentlemen of the jury, listen to your verdict as it stands recorded:

You say you find all three defendants guilty on all three counts.

(The jury was polled.)

(Each juror answered in the affirmative.)

Mr. Frank Healey [attorney for Mr. Donovan]: At this time, your Honor, may I respectfully move—

The Court [Judge Walsh]: Just a minute. I will excuse the jury.

Mr. Foreman, ladies and gentlemen of the jury: I thank you again for your conscientious service. I think your verdict is a very conscientious one and I think there is ample basis for it in the record, and I know that you spent a good deal of time in deliberating and coming to the conclusion that you have. On behalf of the community we thank you. We will excuse you now with the thanks of the Court.

(Jury retires.)

Mr. Frank Healey: At this time, your Honor, on behalf of all defendants may I respectfully move to set aside the jury verdict as being contrary to law and contrary to the weight of the evidence.

The Court: I will deny your motion.

Mr. Frank Healey: That is on behalf of all three defendants.

The Court: Yes. In view of the state of the law I don't see any point in postponing sentence because I think very little—

Mr. Jaffe [Assistant United States Attorney]: If your Honor wishes, it is satisfactory to the Government.

The Court: I think we might as well hear whatever there is to be said on the question of sentence right now. I have relatively little discretion.

Mr. Frank Healey: I have nothing.

Mr. Leo Healey [attorney for Mr. Andrews]: I have nothing, Judge.

Mr. Friedman [attorney for Mr. Cohen]: I don't know. I am not completely satisfied on the state of the law, your Honor. I think in view of what is involved here we should have an opportunity to study it and see if anything can be said with respect to the sentence, unless your Honor is satisfied.

The Court: No. I am not satisfied. In view of the verdict, I mean on count 2, I think the sentence is mandatory, and I don't think I have any power, for instance, to suspend on that, and sentence on the other counts. I don't think I have that power. I will be glad to have any further research that you care to do on it. I would impose sentence now, and if you can convince me that I have power further than I have, that I think I have, I will be glad at any time in the next week or so to consider your view.

Mr. Friedman: Very well.

The Court: I will sentence the three defendants, the sentence on count 2 is mandatory, twenty-five years, and I sentence you to be committed to the custody of the Attorney General for a period of twenty-five years.

Now I am going to also sentence you on the other counts, but those sentences will run concurrently, you will serve all at the same time. I won't extend the period—

Mr. Jaffe: Your Honor, may I approach the bench?

The Court: Yes.

I will impose sentence on count 3 of five years on each defendant to run concurrently with the sentence on count 2. I will not impose any separate sentence on count 1.

Mr. Friedman: Will your Honor, on behalf of the defendant Cohen, entertain an application of bail pending appeal?

The Court: No. In view of the severity of the sentence I see no basis—what was the bail that he was under pending trial?

Mr. Friedman: He was held in $50,000 bail.

The Court: Well—

Mr. Friedman: Your Honor must recognize that in a case of this kind, it being rather unusual, certainly with respect to the defendant Cohen there are various questions of law which are arguable.

The Court: Well, Mr. Friedman, I recognize that as to the defendant Cohen there may be questions of law that you want to argue. On count 3 I see no substantial question whatever. In other words, regardless of what points you may raise as to count 2, I see no basis, substantial basis, or any substantial question as to count 3, inasmuch as the sentence for Cohen is five years under Count 3, regardless of his guilt under count 2, and I don't see any point of continuing bail.

Mr. Friedman: May I say that all the questions of law that have been raised in the case with respect to the admissibility of evidence, with respect to the requests to charge, exceptions to the charge, apply to the third count just as they do to every other count.

The Court: I will deny your application pending appeal. I don't think there is any substantial question under count 3. I will leave it to you to do what you can as to the sufficiency of the evidence under count 2 But that to me is not a question to be raised at this time because I think there is no substantial question as to count 3.

Mr. Friedman: Very well.

The Court: All right.

(Trial concluded.)

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 491

ALBERT ANDREWS, PETITIONER

v.

UNITED STATES OF AMERICA

No. 494

ROBERT L. DONOVAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (R. 74–77) is reported at 301 F. 2d 376. Prior opinions of the court of appeals are reported at 242 F. 2d 61 and 252 F. 2d 788, certiorari denied, 357 U.S. 940 (as to Andrews), and 358 U.S. 851 (as to Donovan). A prior opinion of the district court is reported at 170 F. Supp. 380, affirmed, 263 F. 2d 608, certiorari denied, 360 U.S. 904.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 1962 (R. 78). Andrews' petition for a writ of certiorari (No. 491) was filed on April 14, 1962. A petition for rehearing by Donovan was denied on April 27, 1962 (R. 79). On May 24, 1962, Mr. Justice Harlan extended the time for the filing of Donovan's petition for a writ of certiorari to June 26, 1962, and the petition (No. 494) was filed on June 25, 1962 (R. 80). On October 8, 1962, the Court granted the petitions for writs of certiorari (R. 80–81; 371 U.S. 812). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals had jurisdiction to entertain an appeal by the government from the grant of each petitioner's motion to have his sentence vacated on the ground that he had not been asked, at the time of sentencing, if he wished to speak in his own behalf.

2. Whether the court of appeals properly reversed the orders of the district court vacating the sentences.

STATUTES AND RULE INVOLVED

Section 2114 of Title 18, U.S.C., provides in pertinent part:

> Whoever assaults any person having lawful charge, control, or custody of any mail matter or of any money or other property of the United States, with intent to rob, steal, or purloin such mail matter, money, or other

> property of the United States, or robs any such person of mail matter, or of any money, or other property of the United States, shall, for the first offense, be imprisoned not more than ten years; and if in effecting or attempting to effect such robbery he wounds the person having custody of such mail, money, or other property of the United States, or puts his life in jeopardy by the use of a dangerous weapon * * * shall be imprisoned twenty-five years.

Section 2255 of Title 28, U.S.C., provides in pertinent part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to imposed such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court to vacate, set aside or correct the sentence.
>
> * * * * * *
>
> An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.
>
> * * * * * *

Rule 32(a), F. R. Crim. P., provides:

> Sentence shall be imposed without unreasonable delay. Pending sentence the court may commit the defendant or continue or alter the bail. Before imposing sentence the court shall

> afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment.

Rule 35 of the Federal Rules of Criminal Procedure provides in pertinent part:

> *Correction or Reduction of Sentence.* The court may correct an illegal sentence at any time. * * *

STATEMENT

A three count indictment returned in October 1954 in the United States District Court for the Southern District of New York charged the petitioners and one Hyman Cohen with having assaulted a postal employee with intent to rob (count 1), with having assaulted with a dangerous weapon a postal employee with intent to rob (count 2), and with having conspired to commit robbery of a post office (count 3), in violation of 18 U.S.C. 2114 (R. 1, 12–14). After a jury trial, the petitioners and Cohen were found guilty as charged. On December 31, 1954, Judge Walsh sentenced each defendant to concurrent terms of imprisonment of twenty-five years on count two and to five years on count three. No sentence was imposed on count one which merged into count two. (R. 15, 16–17, 18–19.) On appeal, the court of appeals affirmed the convictions but remanded the case for resentencing of all defendants on the count charging assault with a dangerous weapon because the district judge had erroneously concluded that he lacked the power to suspend sentence and grant probation on that count. *United States* v. *Donovan*, 242 F. 2d 61 (C.A. 2).

Resentencing of the petitioners and Cohen was scheduled for May 20, 1957. At that time, Judge Walsh, in the presence of the Assistant United States Attorney and counsel for the petitioners and Cohen, immediately inquired whether the defendants were present and was told by counsel for the petitioners that they were "on their way up" (R. 21). Prior to the appearance of the petitioners and Cohen in court, counsel for the petitioners began addressing the court regarding the court's sentencing power—in particular, the merger of count one into count two and the authority of the court under the probation statute. Counsel also requested the court to grant the defendants some consideration for the time already spent in prison (R. 21–24). The Assistant United States Attorney responded very briefly to the question of the court's power, stating that the jurisdiction of the court was limited to resentencing on count two and that the court must either give the defendants a suspended sentence or a sentence of twenty-five years on that count (R. 24, 25). The court then terminated the short discussion because of the absence of the defendants (R. 25).

When the defendants had appeared, the actual sentencing proceedings commenced. The Assistant United States Attorney briefly summarized the role of each defendant in the crime, and counsel for each of the petitioners told the court about extenuating circumstances which would justify probation on count two for each petitioner (R. 26–27, 28–30).

At the conclusion of these statements, the court said that it would not suspend the 25-year sentences

imposed as to the petitioners, "the two men who perpetrated the holdup of the truck" (R. 30–31). The court suspended the 25-year sentence as to Cohen because he had not accompanied the petitioners to the scene of the holdup (R. 31). On May 29, 1957, the court entered orders reaffirming the December 1954 sentences imposed on the petitioners on count two (R. 33, 34). The judgments as to the petitioners were affirmed on appeal, and certiorari was denied. See *United States* v. *Donovan and Andrews*, 252 F. 2d 788 (C.A. 2), certiorari denied, 357 U.S. 940, 358 U.S. 851.

The instant proceedings commenced on April 17, 1961,[1] when Donovan filed in the district court a "motion to vacate illegal sentence" (the 25 year sentence) on the ground that he had not been afforded an opportunity to make a statement in his own behalf either at the time of original sentencing or at the time of resentencing (R. 35). In a letter to the clerk, petitioner requested that his "motion to vacate under the provisions of Rule 35, Federal Rules of Criminal Procedure" be filed and requested the clerk to file an enclosed notice of appeal in the event of denial of the motion because "under Rule 35 [he] would have only

[1] In 1958, petitioner Andrews unsuccessfully moved under Rule 35, F.R. Crim. P., for correction or reduction of sentence. *United States* v. *Andrews*, 170 F. Supp. 380 (S.D.N.Y.), affirmed, 263 F. 2d 608 (C.A. 2), certiorari denied, 360 U.S. 904. In 1959, petitioner Andrews filed a motion to set aside the conviction which was treated as a motion to vacate judgment under 28 U.S.C. 2255 and denied without a hearing. Leave to appeal in forma pauperis was denied by the district court and the court of appeals, and this Court denied a petition for a writ of certiorari. 363 U.S. 854.

10 days to appeal" (R. 38). Thereafter, Donovan filed a brief "Supplement to Motion Filed Under Rule 35, Federal Rules of Criminal Procedure" in which he called the court's attention to the case of *Van Hook* v. *United States,* 365 U.S. 609 (R. 39). On June 16, 1961, District Judge Murphy granted the motion and ordered that Donovan be returned for resentencing on the ground that "at no time did Judge Walsh ask the defendant whether he had anything to say, although defendant's counsel was heard at length. We gather from *Green* and *Van Hook* this is not enough. Accordingly, it would appear that the defendant's right of allocution was denied him" (R. 40). Thereafter, the United States Attorney noted an appeal to the court of appeals and the district court entered an order staying its June 16th order until disposition of the appeal (R. 48–49, 58).

On July 19, 1961, the following letter from petitioner Andrews to District Judge Murphy was filed (R. 49–50):

> It is my understanding that this Honorable Court vacated the judgment of my codefendant, Robert L. Donovan, on June 16, 1961, because his right of allocution was denied him. Rule 32(a) of the Federal Rules of Criminal Procedure; Green v. United States, 365 U.S. 301; and Van Hook v. United States, 365 U.S. 609.
>
> Since the identical circumstances exist with me, I very respectfully request that this Honorable Court vacate my judgment. Thank you.

The court granted the request for resentencing on July 18, 1961 (R. 50). Thereafter, the United States Attorney noted an appeal and the district court entered an order staying its order of July 18th until disposition of the appeal (R. 52, 55).

Petitioners thereafter filed motions in the court of appeals for admission to bail and for dismissal of the government's appeal on grounds of lack of jurisdiction (R. 59, 60–61, 64–67, 69–70). The court of appeals denied the applications for bail and deferred ruling on the motions to dismiss the appeals until oral argument of the appeals (R. 64, 68, 73). On March 23, 1962, the court of appeals reversed the orders of the district court and remanded the cause with instructions that the petitions be dismissed (R. 74–77, 78).

SUMMARY OF ARGUMENT

I

Petitioners' motions to vacate their sentences because they were not properly accorded their rights of allocution would not lie under Rule 35 of the Federal Rules of Criminal Procedure. *Hill* v. *United States*, 368 U.S. 424; *Machibroda* v. *United States*, 368 U.S. 487. Motions to vacate sentence because of improper sentencing procedures lie, if at all, under 28 U.S.C. 2255. Regardless of how the petitioners described their motions, the fact that they were seeking a vacation of their sentences on grounds of improper sentencing procedures required the district court to consider their motions under 28 U.S.C. 2255—the

proper statutory provision—rather than under Rule 35 upon which they mistakenly relied; and required the court of appeals, for purposes of review, to consider any relief accorded as having been granted under the proper statutory authority, 28 U.S.C. 2255. The United States was plainly entitled to appeal from the vacation of the petitioners' sentences under 28 U.S.C. 2255, for this judgment of the district court was a final reviewable decision in a civil proceeding which was collateral to and independent of the criminal conviction.

II

The district court erred in granting the motions and vacating the sentences since the mere failure on the part of the court to ask a defendant, represented by counsel, whether he wished to make a statement in his own behalf before sentencing is not cognizable on collateral attack. *Hill* v. *United States, supra,* 368 U.S. 424; *Machibróda* v. *United States, supra,* 368 U.S. 487. There were in this case no circumstances of aggravation surrounding the failure to comply with the formal requirements of Rule 32(a) of the Federal Rules of Criminal Procedure sufficient to make the applications cognizable on collateral attack. The record refutes the claim that the sentencing judge was misformed as to the nature of Andrews' participation in the attempted robbery. Moreover, the court committed no error when, while awaiting the arrival in court of the petitioners, it heard a short preliminary

discussion of its sentencing powers by counsel for all parties. Even if permitting this discussion to take place in the absence of the petitioners were error, it could not have affected the sentences imposed; for the discussion involved solely a legal issue, the court's judgement was appealed and affirmed, and there is even now no contention that this legal issue was decided incorrectly.

ARGUMENT

I

PETITIONERS' MOTIONS TO VACATE SENTENCE COULD BE ENTERTAINED ONLY UNDER 28 U.S.C. 2255 AND THE UNITED STATES CAN APPEAL FROM THE GRANTING OF SUCH MOTIONS

Petitioners' motions to vacate their sentences were based upon a violation of their rights to be asked if they wished to speak before sentencing. The district court has jurisdiction to act upon motions bottomed on an illegal sentencing procedure under 28 U.S.C. 2255 but not under Rule 35, F.R. Crim. P. The court of appeals therefore correctly treated a government appeal from orders entered on these motions as an appeal from orders entered within the jurisdiction of the district court in collateral civil proceedings under 28 U.S.C. 2255. These orders, which concluded the Section 2255 proceedings at the same time they reopened the criminal cases, were plainly final orders under 28 U.S. C. 2255.

A. A MOTION TO VACATE SENTENCE FOR FAILURE TO OFFER THE RIGHT OF ALLOCUTION DOES NOT LIE UNDER RULE 35 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

1. This issue was squarely decided over vigorous dissent twice during the last term of this Court. Rule 35, F. R. Crim. P., provides in part that the "court may correct an illegal sentence at any time." In *Hill* v. *United States*, 368 U.S. 424, this Court held that a denial of allocution rights under Rule 32(a) of the Federal Rules of Criminal Procedure does not render the sentence "illegal" within the meaning of Rule 35. In considering the applicability of Rule 35, the Court said (*id.* at 430):

> It is suggested that although the petitioner denominated his motion as one brought under 28 U.S.C. 2255, we may consider it as a motion to correct an illegal sentence under Rule 35 of the Federal Rules of Criminal Procedure. This is correct. *Heflin* v. *United States*, 358 U.S. 415, 418, 422. But, as the Rule's language and history make clear, the narrow function of Rule 35 is to permit correction at any time of an illegal *sentence*, not to reexamine errors occurring at the trial or other proceedings prior to the imposition of sentence. The sentence in this case was not illegal. The punishment meted out was not in excess of that prescribed by the relevant statutes, multiple terms were not imposed for the same offense, nor were the terms of the sentence itself legally or constitutionally invalid in any other respect.

This portion of *Hill* was reaffirmed in *Machibroda* v. *United States, supra,* 368 U.S. 487, 489. While the Court in *Hill* left open the question of availability of relief under 28 U.S.C. 2255 where the denial of allocution rights was surrounded by aggravating circumstances, the opinion is clear that a failure to accord the rights granted by Rule 32(a) before imposition of sentence, whether accompanied by circumstances of aggravation or not, does not result in an "illegal" sentence within Rule 35 and accordingly is not cognizable under that Rule.[2] This is a direct holding and not a mere implication, as petitioners suggest; and it has been recognized as such by the lower courts. *United States* v. *Cox,* 29 F.R.D. 475, 479 (W.D. Mo.).

2. The whole history and purpose of Rule 35, which is more fully discussed in the government's brief in *Hill* (Nos. 68 and 69, O.T. 1961, pp. 33–35),

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[2] Any possible suggestion in *Green* v. *United States,* 365 U.S. 301, that Rule 35 might be available in the circumstances of this case was overruled in *Hill.* In *Green,* four Justices of this Court believed the record to be too ambiguous to show whether the trial court failed to follow the formal requirements of Rule 32(a) before impositon of sentence and accordingly affirmed the denial of the Rule 35 application. The Court said that the defendant "failed to meet his burden of showing that he was not accorded the personal right which Rule 32(a) guarantees, and we therefore find that his sentence was not illegal." *Id.* at 305. Contrary to petitioner's assertion (Br. 31), *Green* did not "clearly contemplate" that challenges to sentences on grounds of a denial of allocution rights could properly be raised under Rule 35; the Court simply did not decide whether a failure to follow the requirements of Rule 32(a) would be cognizable on collateral attack or would make the sentence "illegal" within the meaning of Rule 35.

negates any attempt to expand Rule 35 to cover challenges to sentences because of alleged defects in the procedure leading up to sentencing, as distinguished from invalidity appearing from the judgment itself.

At common law, as well as in the federal courts, the rule prevailed that a court lost jurisdiction over its judgments, civil or criminal, at the end of the term of court at which the judgments were entered unless the court expressly carried over disposition of the case to a succeeding term of court. E.g., *United States* v. *Mayer*, 235 U.S. 55, 67–69; *United States* v. *Pile*, 130 U.S. 280. However, the uniform practice allowed a court to assume jurisdiction after term time where the judgment was "void" or "illegal," or where there were clerical mistakes in the judgment which needed correction. *Lockhart* v. *United States*, 136 F. 2d 122, 124 (C.A. 6); *Gilmore* v. *United States*, 124 F. 2d 537, 539 (C.A. 10), certiorari denied, 316 U.S. 661; *Gargano* v. *United States*, 140 F. 2d 118 (C.A. 9). The illegality subject to correction after term was limited to errors appearing on the face of the record, which did not involve going back into the transcript of the trial. See *United States* v. *Bradford*, 194 F. 2d 197 (C.A. 2), certiorari denied, 343 U.S. 979; *United States* v. *Zisblatt*, 172 F. 2d 740 (C.A. 2).

The Notes of the Advisory Committee to Rule 35 indicate that the first sentence of Rule 35 was but a continuation of "existing law." As the majority opinion in *Hill* v. *United States* noted, "Rule 35 was a codification of existing law and was intended to remove any doubt created by the decision in *United*

States v. *Mayer*, 235 U.S. 55, 67, as to the jurisdiction of a District Court to correct an illegal sentence after the expiration of the term at which it was entered." *Hill, supra*, 368 U.S. at 430 fn. 8.

The use of Rule 35 has for the most part been confined to these situations where the sentence, as disclosed by the record, was in excess of the statutory provision or in some way contrary to the applicable statute, as where multiple sentences were imposed for the same offense.[3] As this Court summed up the situation in *United States* v. *Morgan*, 346 U.S. 502, 506, the sentences subject to correction under Rule 35 are "those that the judgment of conviction did not authorize."

The remedy under Rule 35 has occasionally been applied in other situations, where illegality appeared on the face of the common law record, as in the cases holding sentences to be illegal because the defendant was not present. See *Cook* v. *United States*, 171 F. 2d 567 (C.A. 1), certiorari denied, 336 U.S. 926; *Crowe* v. *United States*, 200 F. 2d 526 (C.A. 6). In those cases the absence of the defendant appeared from the face of the judgment and therefore correction of the illegal sentence did not involve any consideration of the transcript, as distinguished from the judgment roll. Before the enactment of 28 U.S.C. 2255, some lower courts were disposed to expand the

[3] See *Callanan* v. *United States*, 364 U.S. 587; *Heflin* v. *United States*, 358 U.S. 415; See also *e.g.*, *Lockhart* v. *United States*, *supra*, 138 F. 2d 122 (C.A. 6) and cases cited therein; *Gargano* v. *United States*, 140 F. 2d 118 (C.A. 9); *Bugg* v. *United States*, 140 F. 2d 848 (C.A. 8), certiorari denied, 323 U.S. 673.

scope of Rule 35 so that a collateral remedy would be available in the sentencing court rather than in a different jurisdiction under habeas corpus. E.g., *Byrd* v. *Pescor*, 163 F. 2d 775 (C.A. 8), certiorari denied, 333 U.S. 846. But the necessity for any such expansion of Rule 35 beyond its recognized, historical limits disappeared with the enactment of 28 U.S.C. 2255, and there is now no justification for using Rule 35 to set aside judgments which were not erroneous on their face. This Court's decisions in *Hill and Machibroda*, holding that claims for denial of rights of allocution are not cognizable under Rule 35, were thus plainly correct.

B. THE ONLY AVAILABLE JURISDICTIONAL PROVISION FOR ATTACKING A FAILURE OF ALLOCUTION AFTER A FEDERAL PRISONER HAS BEEN CONVICTED AND SENTENCED AND HIS CONVICTION AND SENTENCE HAVE BEEN SUSTAINED ON APPEAL IS 28 U.S.C. 2255

Section 2255 of Title 28, in contrast to Rule 35, was intended to establish a general procedure for all collateral attacks on a final judgment of conviction. If the error in petitioners' sentencing was of such seriousness that it could be reviewed after final judgment and appeal,* review would lie solely under Section 2255 by way of a motion "to vacate * * * sentence" by a "prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence

* The mere failure to follow the formal commands of Rule 32(a) is grounds for appeal from the judgment of conviction and for resentencing in accordance with that Rule. *Van Hook* v. *United States*, 365 U.S. 609.

was imposed in violation of the * * * laws of the United States."

The scope of the remedy afforded by Section 2255 plainly extends to the granting of relief—in circumstances where collateral attack on a final judgment is appropriate—to a prisoner asserting that his sentence was illegally imposed. The history of this section, set forth in this Court's opinion in *United States* v. *Hayman*, 342 U.S. 205, shows that it was broadly designed to encompass all forms of collateral relief available in the federal courts to a person in custody under the sentence attacked. Indeed the reviser's note specifically states that the statute "provides an expeditious remedy for correcting erroneous sentences without resort to habeas corpus." The remedy was designed to permit the sentencing court to grant the type of relief formerly available in the federal courts on habeas corpus. And from the time of *In re Mills*, 135 U.S. 263, and *In re Bonner*, 151 U.S. 242, habeas corpus was recognized as an appropriate remedy for a claim that a sentence had been illegally imposed.

Petitioners themselves acknowledge that this Court, in the decision in *Hill* v. *United States*, 368 U.S. 424, indicated that the remedy under 28 U.S.C. 2255 might be appropriate to correct an illegal sentencing procedure, although it ruled that a mere denial of the right of allocution was not a sufficient ground for collateral attack on a criminal judgment. The Court left open the question whether 28 U.S.C. 2255 would be an appropriate remedy to challenge sentences imposed in violation of Rule 32(a) where "aggravating

circumstances" were present, saying (368 U.S. at p. 429):

> It is to be noted that we are not dealing here with a case where the defendant was affirmatively denied an opportunity to speak during the hearing at which his sentence was imposed. Nor is it suggested that in imposing the sentence the District Judge was either misinformed or uninformed as to any relevant circumstances. Indeed, there is no claim that the defendant would have had anything at all to say if he had been formally invited to speak. Whether § 2255 relief would be available if a violation of Rule 32(a) occurred in the context of other aggravating circumstances is a question we therefore do not consider. We decide only that such collateral relief is not available when all that is shown is a failure to comply with the formal requirements of the Rule.

This is more than an implicit recognition that if relief is available at all, it is in a proceeding under 28 U.S.C. 2255. Significantly, since *Hill*, four courts of appeals have assumed that where "aggravating circumstances" accompanied a denial of allocution rights under Rule 32(a), the sentence is subject to collateral attack under 28 U.S.C. 2255. *E.g.*, *Hoyland* v. *United States*, 304 F. 2d 853, 854 (C.A. 7); *United States* v. *Bebik*, 302 F. 2d 335, 337 (C.A. 4); *Rosa* v. *United States*, 301 F. 2d 630, 630–631 (C.A. 5); *Hood* v. *United States*, 307 F. 2d 507, 508 (C.A. 8); *Hughes* v. *United States*, 304 F. 2d 91, 94 (C.A. 5); *United States* v. *Taylor*, 303 F. 2d 165, 167 (C.A. 4).

The suggested "enormous" practical difficulties in treating an attack on a sentence as a proceeding under 28 U.S.C. 2255 (Pet. Br. 33-35) are non-existent. A major purpose of the remedy under 28 U.S.C. 2255 was to have the original record in the criminal proceedings available in determining whether there was any validity to the collateral attack on the judgment. See *United States* v. *Hayman*, 342 U.S. 205, 213-214. Thus, the statute specifically provides for a hearing "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief". The original record is always made part of a proceeding under 28 U.S.C. 2255 and there is no more trouble in getting the original record before an appellate court in a proceeding under 28 U.S.C. 2255 than there would be in a proceeding under Rule 35. It is true that, under 28 U.S.C. 2255, a prisoner is not entitled to attack a judgment while he is not serving the sentence (*Heflin* v. *United States*, 358 U.S. 415), but the remedy would be available as soon as his term commenced. Moreover, that situation could arise only very rarely with respect to the right of allocution. If a defendant was not asked to make a statement before sentencing, that denial would normally go to all counts.

It is thus clear that the only statutory power granted to the district courts by Congress to consider a post-appeal attack on the method of imposing sentence is under the general provisions of 28 U.S.C. 2255. Not every error in imposing sentence justifies collateral attack after judgment and appeal. But the only av-

enue for attacking the procedures followed in imposing sentence after appeal is under Section 2255.

C. FOR PURPOSES OF DETERMINING APPEALABILITY, A DISTRICT COURT'S ORDER GRANTING A MOTION TO VACATE A PRISONER'S SENTENCE ON GROUNDS OF A VIOLATION OF HIS RIGHTS OF ALLOCUTION IS NECESSARILY VIEWED AS IF GRANTED UNDER THE ONLY STATUTORY PROVISIONS (28 U.S.C. 2255) CONFERRING UPON THE DISTRICT COURT JURISDICTION TO ENTERTAIN SUCH A MOTION

Each petitioner filed a motion to vacate sentence on the ground that he was not afforded an opportunity to make a statement in his own behalf as provided in Rule 32(a), Federal Rules of Criminal Procedure (R. 35, 49). Petitioner Donovan made clear his belief that his motion would lie under Rule 35 of the Federal Rules of Criminal Procedure. Petitioner Andrews merely requested the same relief granted Donovan. The district court granted both motions without indicating under what statutory authority it was acting.

Against this factual background and considering the district court's lack of power to grant relief under Rule 35, the court of appeals correctly treated the district court's decision and order as having been made under 28 U.S.C. 2255, the only provision under which petitioners' motions for relief could be entertained and decided on the merits. There was no reason for the court of appeals to assume that the district court had acted beyond its statutory jurisdiction.

Moreover, the court of appeals could not have denied review even if the district court had stated explicitly, though erroneously, that it was acting under Rule 35. Section 2255 of the Judicial Code grants

the courts of appeals jurisdiction over appeals from the ordered "entered on the motion" "to vacate * * * sentence" made by a "prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the * * * laws of the United States." These words apply precisely to the orders entered by Judge Murphy on the motions to vacate the sentences of the petitioners in this case. Just as the jurisdiction of the sentencing court under Section 2255 does not depend upon how the prisoner labels his motion, so the statutory jurisdiction of the court of appeals under 28 U.S.C. 2255 does not depend upon the label chosen either by the prisoner or by the district court. The content of the motion upon which the order was granted is decisive, *i.e.*, the relief requested and the grounds given for demanding that relief. See e.g., *Mitchell* v. *United States*, 368 U.S. 439; *Hill, supra*, 368 U.S. at 430.

It is thus clear that the plain language of the appeal provisions of Section 2255 makes the government's right to appeal turn on whether the motion was one within the jurisdiction of the district court under 28 U.S.C. 2255, that is, upon the actual authority for the district court's order and not upon the label attached. This is necessitated by basic requirements of fairness. If a prisoner states a valid claim for relief under 28 U.S.C. 2255 but labels his motion under the Federal Rules of Civil Procedure, the district court is still obligated to consider the motion under the correct jurisdictional provision and grant it if it is meritorious. Similarly, if the district court

correctly grants the motion but erroneously labels its order under an inapplicable statute, the court of appeals has jurisdiction to review the proceeding as if from an order under the proper statute and cannot reverse the order granting the prisoner relief simply because the prisoner and the district court have mislabeled the motion and order.

In the present case the district court had jurisdiction to hear the petitioners' motions under 28 U.S.C. 2255 but not under Rule 35. If it had denied the motions on the sole ground that it had no jurisdiction under Rule 35, the court of appeals would have had to reverse the decision for consideration of the claim under 28 U.S.C. 2255 because the relief asked and the grounds stated fell within the jurisdictional ambit of that section. When the district court instead granted the motions without specifying the source of its statutory authority, the court of appeals properly treated the district court's orders as having been issued—correctly or incorrectly—under the only statute granting such jurisdiction, 28 U.S.C. 2255.

D. THE DISTRICT COURT'S ORDERS GRANTING MOTIONS TO VACATE SENTENCE WERE FINAL ORDERS IN COLLATERAL PROCEEDINGS AND THUS REVIEWABLE BY THE COURT OF APPEALS

An action to vacate or set aside a sentence under 28 U.S.C. 2255 is a civil action independent of the criminal case, *United States* v. *Hayman*, 342 U.S. 205. It is in this respect analogous, not only to habeas corpus proceedings, but to independent actions to set aside a civil judgment. See *Stevirmac Oil & Gas Co.* v. *Dittman*, 245 U.S. 210. An order either granting or denying the motion to set aside the judgment

terminates the collateral civil proceeding and is final and appealable as such. Indeed, in 28 U.S.C. 2255 Congress specifically provided that:

> An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

In the present case each petitioner filed a motion to vacate his sentence as illegally imposed. Although petitioner Donovan also asked that he be properly resentenced (R. 35), this portion of his request for relief was surplusage. Each petitioner was granted all the relief he was entitled to ask when his sentence was set aside. The petitioners had no interest in then being resentenced. The district court's orders terminated the authority of the United States to hold the petitioners in custody under their prior sentences; any further custody would be under other authority and under later judgments than the judgments attacked by their motions. This was the full relief sought by petitioners in filing their motions.

It is, of course, true that the effect of the district court's orders granting the motions to vacate sentence was to cause the original criminal judgment to become non-final. But the orders themselves constituted the final disposition of a separate and collateral attack in a civil proceeding (under Section 2255) on the criminal sentences. Nothing more remained to be done in these collateral proceedings. Any resentencing would take place as part of the criminal proceeding reopened by the final order in the civil proceeding under 28 U.S.C. 2255. The orders of the district court were therefore reviewable at once.

It is firmly established that review of the final order in a collateral attack on a conviction or sentence need not await the outcome of the criminal judgment which is made non-final by the result of the collateral attack. The normal result of a successful motion under 28 U.S.C. 2255 is a new trial which may result in the same or a greater sentence for the prisoner, but the United States is free to appeal at once from the judgment terminating the proceeding under Section 2255.[4] Thus, for example, in *United States* v. *Kelly*, 269 F. 2d 448 (C.A. 10), certiorari denied, 362 U.S. 914, the district court vacated judgments of conviction because, in the hearing under 28 U.S.C. 2255, the government refused to produce certain F.B.I. files relating to the original case, as ordered by the court. In response to the defendant's argument that an appeal from the grant of the motion was really from the order to produce, the court said:

> * * * The Government did not appeal from the directive of the court for the production of the files. The appeal was taken from the order vacating and setting aside the judgments and sentences in the two criminal cases. Such order was predicated upon the refusal to make the files available to the court. But the *scope and effect of the order was to vacate and set aside the judgments and sentences in the two*

[4] Section 2255 of Title 28 authorizes an appeal from the order entered on the motion "as from a final judgment in applications for a writ of habeas corpus." The right of the United States to appeal from final judgments entered in habeas corpus cases is well recognized. E.g., *Craig* v. *Hecht*, 263 U.S. 255, 277; *Collins* v. *Miller*, 252 U.S. 364, 371; *Tang Tun* v. *Edsell*, 223 U.S. 673, 682; *United States* v. *Ju Toy*, 198 U.S. 253, 259; *United States* v. *Jung Ah Lung*, 124 U.S. 621, 625, 626.

criminal cases. And an order of that kind is open to appeal by the Government. [Emphasis added.]

The effect of the order in *Kelly* was to require a new trial, and in that sense something further remained to be done in the criminal case just as resentencing would remain to be done in this case if Judge Murphy's orders had not been reversed. However, there, as here, the judgments in the proceeding under 28 U.S.C. 2255 were final because they ended the proceeding to vacate existing final judgments. See also *United States* v. *Williamson,* 255 F. 2d 512, 515 (C.A. 5), certiorari denied, 358 U.S. 941.

The finality of the order is further illustrated by this Court's judgment in *In re Bonner,* 151 U.S. 242. The Court issued a writ of habeas corpus as an appropriate remedy for correction of an illegal sentence, even though it specifically held that the grant of the writ did not affect "the right of the United States to take any lawful measures to have the petitioner sentenced in accordance with law upon the verdict against him" (151 U.S. at 262). In other words, there was a termination of the habeas corpus proceeding by the grant of the writ, even though further proceedings could be had, consistently with this Court's final judgment, in the district of trial on a criminal judgment which, by virtue of the final ruling in habeas corpus, had become non-final in that there was no valid sentence in effect.

It is thus plain that the district court's orders granting petitioners' motions to vacate sentence were final and correctly held to be appealable under the provisions of 28 U.S.C. 1291 and 2255.

II

PETITIONERS' MOTIONS TO VACATE THEIR SENTENCE AFTER CONVICTION AND APPEAL SHOULD HAVE BEEN DENIED BY THE DISTRICT COURT

In denying collateral relief under 28 U.S.C. 2255 for a violation of Rule 32(a), this Court stated in *Hill* v. *United States* (368 U.S. at 429):

> It is to be noted that we are not dealing here with a case where the defendant was affirmatively denied an opportunity to speak during the hearing at which his sentence was imposed. Nor is it suggested that in imposing the sentence the District Judge was either misinformed or uninformed as to any relevant circumstances. Indeed, there is no claim that the defendant would have had anything at all to say if he had been formally invited to speak. Whether § 2255 relief would be available if a violation of Rule 32(a) occurred in the context of other aggravating circumstances is a question we therefore do not consider. We decide only that such collateral relief is not available when all that is shown is a failure to comply with the formal requirements of the Rule.

It is the petitioners' contention that this case involves such "aggravating circumstances" that collateral relief should have been available despite the holding of *Hill*. We submit that there are no meaningfully aggravating circumstances present in this case and that, to the contrary, there were significant ameliorating circumstances making the failure to hear the defendants prior to sentencing far less serious than is ordinarily the case.

A. THERE ARE CIRCUMSTANCES AMELIORATING THE EFFECTS OF THE DISTRICT COURT'S FAILURE TO ASK THE DEFENDANTS IF THEY WISHED TO BE HEARD PRIOR TO SENTENCING

The present case was remanded to the district court in 1957 for the sole purpose of having that court exercise the limited choice available to it of probation or the mandatory sentence of twenty-five years. There is thus no reasonable possibility that anything which petitioners wished the district court to hear would not have been marshalled by their attorneys, who specifically directed themselves to this question. The attorneys in fact addressed the district court at some length with respect to each individual petitioner, setting forth in detail those circumstances of background and those hardships of sentence which might have led the court to grant probation. A review of the statements of counsel prior to sentencing (R. 27–30) leaves little room for doubt that every extenuating circumstance known to the petitioners was brought forward by their attorneys. Neither petitioner asked to add anything to the statements of counsel.

The conclusion that these petitioners received substantially all the benefits of a right of allocution is confirmed by the fact that they did not make any reference to this issue on appeal to the court of appeals after resentencing or in their petitions for writs of certiorari, although issues as to the sentence were raised and argued. In these circumstances the district court's failure to ask the defendants if they wished to speak before sentencing was not so serious an error as to be reviewable on collateral attack on their convictions.

B. THERE ARE NO CIRCUMSTANCES SIGNIFICANTLY AGGRAVATING THE FAILURE OF THE DISTRICT COURT TO COMPLY WITH THE REQUIREMENTS OF RULE 32(a)

Despite the careful presentation of every extenuating circumstance by counsel for the petitioners, petitioners now contend that there were two main aggravating circumstances distinguishing this case from *Hill* and making collateral relief appropriate.[5] We submit that neither circumstance realistically affected the rights of the petitioners in this case.

1. There were no aggravating effects of the short discussion by counsel for all parties prior to the appearance of the defendants and Mr. Healy

Immediately upon opening the hearing on resentencing in this case the district judge inquired, "Are the defendants present?" Mr. Friedman, counsel for all three defendants, replied that they were on their way up and then at once began discussing the power of the district court to sentence on the lesser of two merging offenses. Mr. Friedman's argument lasted the greater part of the few minutes of discussion

[5] Petitioners also list a third "aggravating circumstance"—an asserted failure of the district court to comply with Rule 32(a) at the initial sentencing of the petitioners in 1954 (Pet. Br. 43, fr. 36).—However, even if the alleged violation of Rule 32(a) appeared from the record with the clarity required by *Green* v. *United States*, 365 U.S. 301 (and it does not (Pet. Br. App. 53-54)), this prior violation of the rule would not constitute an "aggravating circumstance," for it had nothing at all to do with any violation of the petitioners' rights at the 1957 resentencing procedures, which resulted in the judgments under which petitioners are now held and which are alone in issue in this case.

before the defendants arrived, although Mr. Matthews, the government attorney, briefly responded with an argument that fills merely a page of the printed record. The court then terminated the discussion because of the continued absence of the defendants. It is this discussion prior to the arrival of the defendants, and, perhaps, prior to the arrival of Mr. Healey (who, along with Mr. Friedman, represented petitioner Donovan) that is said to constitute the primary aggravating circumstance in this case.

No facts which could possibly have been relevant to the exercise of the district court's discretion in sentencing or to which either petitioner could possibly have wanted to respond were brought out during this discussion. Nor do petitioners contend that the result of this discussion was an erroneous decision on the legal question discussed. The district court had no choice as to the counts on which it could impose sentence—the subject of defense counsel's argument to the court prior to the arrival of the defendants. As shown by the Statement, *supra*, the district court in 1954 did not impose sentence on count one charging assault on a postal employee with intent to rob. The court of appeals held that the court was correct in this regard since that count merged into count two which charged the aggravated form of that offense. 242 F. 2d at 64. The court of appeals specifically remanded the cause for resentencing on count two since the district court had erroneously concluded that it could not grant proba-

tion in view of the mandatory sentence. Thus nothing that could have been said—whether in the presence or absence of the petitioners—could have altered the clear-cut remand from the court of appeals or convinced the district court that it had power to impose sentence on count one. Indeed, this question was appealed, the district court's decision affirmed, and certiorari denied after resentencing, thus establishing for this case the correctness of the district court's decision on the issue briefly discussed by counsel prior to the petitioners' arrival. There is therefore no way in which the absence of the defendants or of Mr. Healey during ths discussion could have affected correct sentencing.

It is also clear, we submit, that it was not error to allow thás short discussion to take place prior to the arrival of the defendants. Such discussions of legal issues regularly take place outside of the hearing of the defendants during a criminal trial when there is a conference on questions of law between the court and counsel for both sides at the bench, in the robing room, or in chambers.[6] It was entirely proper for the attorneys to make some preliminary remarks to the court while waiting for the defendants to arrive. The court was not obliged to maintain absolute silence during this short period. None of the cases

[6] See *United States* v. *Hetherington*, 279 F. 2d 792, 796 (C.A. 7), certiorari denied, 364 U.S. 908; *United States* v. *Switzer*, 252 F. 2d 139, 145 (C.A. 2), certiorari denied, 357 U.S. 922; *Deschenes* v. *United States*, 224 F. 2d 688, 693 (C.A. 10).

cited by petitioners even remotely suggests anything to the contrary.[7]

Petitioner Donovan's additional complaint (Pet. Br. 41–42) that one of his attorneys, Mr. Healey, was not present during these preliminary proceedings is not substantial. Donovan was represented by Mr. Friedman throughout the entire discussion (R. 20). Petitioner's suggestion that Mr. Friedman spoke only for Andrews and not for Donovan during this time is directly and convincingly refuted by the record (R. 20–24). Moreover, the arguments made by Mr. Friedman during the time Mr. Healey may have been absent (the record is not clear on this point) were readvanced by Mr. Friedman in the presence of Mr. Healey at the conclusion of the sentencing proceedings (R. 32–33) and Mr. Healey had nothing to add at that time.

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[7] The cases relied upon by the petitioners are inapposite (Pet. Br. 39–41). All of them deal with situations where the defendant is absent during his actual sentencing or where the court has in some way altered the sentence in the absence of the defendant. *E.g.*, *Pollard* v. *United States*, 352 U.S. 354 (absence of the defendant when court suspended sentence and placed him on probation); *Crowe* v. *United States*, 200 F. 2d 526 (C.A. 6) (absence of defendant when court amended probation order); *Anderson* v. *Denver*, 235 Fed. 3 (C.A. 8) (absence of defendant at sentencing proceedings); *Cook* v. *United States*, 171 F. 2d 567 (C.A. 1), certiorari denied, 336 U.S. 926 (absence of defendant when court added fine to sentence); *Montgomery* v. *United States*, 134 F. 2d 1 (C.A. 8) (absence of defendant when sentences amended to provide for consecutive terms of imprisonment).

2. The Court was not misinformed

Petitioners also argue (Pet. Br. 42) that the court at the time of resentencing was misinformed as to Andrews' participation in the attempted robbery, and that this was an "aggravating circumstance" within the meaning of *Hill*. To support this, petitioners point to the resentencing proceedings where Judge Walsh, in refusing to suspend sentence as to the petitioners, referred to them as "the two men who perpetrated the holdup of the truck"; and to the fact that, in suspending sentence as to Cohen, Judge Walsh said that if Cohen had been with the petitioners "on the truck," or had "been there" with petitioners who had "committed the holdup," he would have sentenced Cohen to imprisonment for twenty-five years (R. 31–32) (Pet. Br. 8, fn. 6, and 42).

The record, however, unambiguously refutes the contention that the court was misinformed. Judge Walsh was the trial judge of the case in 1954. Immediately prior to resentencing the petitioners, the court was reminded of the facts of the case by the United States Attorney who said (R. 25–26):

> As you will recall, there was a holdup with a revolver of the United States mail truck. The actual attempted holdup with the revolver *was performed by Donovan. The person who planned and helped execute the holdup was the defendant Andrews, and Mr. Cohen's part in it was that he was an employee of the post office* at that time, *and he informed Andrews,* who in turn informed Donovan as to what truck they though [*sic.*] held the money and

> registered mail. And, of course, he was aware that a holdup was to take place and it was to be an armed robbery. [Emphasis added.]

In addition, the court had before it a presentence report on the defendants (R. 26); and the facts of the case were set out in the opinion of the court of appeals which remanded the cause for resentencing on count two. Moreover, the court was further reminded during the resentencing proceedings that Donovan was the one who boarded the mail truck. Counsel for Donovan told the court (R. 28):

> Now, this was an unsuccessful attempt by these men with regard to this matter, and with regard to what happened *on the truck, Donovan,* who, I understand, at one time wrote a letter saying that he was willing to take a lie detector test, that he *never had the gun in his possession, to go ahead and commence the holdup of the truck and put the life of the driver in jeopardy,* but be that as it may he was convicted. [Emphasis added.]

After counsel completed their statements, the court concluded that it would not suspend sentence as to the petitioners—"the two men who perpetrated the holdup" (R. 30–31). The court was entirely correct that both petitioners perpetrated the holdup. Both petitioners were at the scene of the attempted robbery and, on a signal from Andrews, Donovan, who was dressed as a postal employee, entered the cab of the mail truck when the driver stopped for a traffic light. Donovan pointed a loaded gun at the driver, but further operations were frustrated when the truck was surrounded by federal agents. Andrews was

arrested while fleeing from the scene of the attempted robbery. See *United States* v. *Donovan*, 242 F. 2d at 62; Government's Brief in Opposition, *Andrews* v. *United States*, No. 992 Misc., O.T. 1959, p. 2; Government's Brief in Opposition, *Donovan* v. *United States*, No. 97 Misc., O.T. 1958, p. 7. The court was fully aware of both petitioners' direct participation in this substantive offense, when, in refusing to suspend sentence, it said (R. 31): "I am sorry to say I do not think I can suspend sentence and permit you to serve only the sentence that a person has to serve *who has conspired but did not carry out the crime.*" (Emphasis added.)

The statements Judge Walsh made to Cohen did not show that he was misinformed as to Andrews' participation in the attempted robbery. Judge Walsh suspended sentence as to Cohen because he was not "with the other two on the truck," because Cohen "had [not] been there" with the petitioners "who [had] committed the holdup" (R. 31–32). The great significance which petitioners attach to the words "on the truck" overlooks the basic fact that Judge Walsh was aware of both petitioners' direct participation and presence at the scene of the attempted robbery as distinguished from the indirect participation and absence from the scene of Cohen. This was the criterion—not who was physically "on the truck"—which Judge Walsh relied upon to differentiate Cohen's participation and suspend sentence as to him. The context in which the words "on the truck" were spoken shows that the judge was thinking of the direct participation in the robbery by both petitioners as dis-

tinguished from Cohen's indirect participation. It certainly cannot be said that this single remark to Cohen had the effect of casting doubt upon the knowledge which Judge Walsh had of the nature of Andrews' participation in the crime, a subject on which he was carefully informed by a number of sources immediately prior to sentencing.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

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ALBERT ANDREWS,

Petitioner,

vs.

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No. 494

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Petitioner,

vs.

UNITED STATES.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

I.

The District Court's Orders Were Interlocutory and Non-appealable.

Most of the Government's brief is devoted to the argument that the District Court had no jurisdiction to grant relief to petitioners under Rule 35, and that the District Court erroneously granted relief under 28 U.S.C. § 2255. The Government's entire argument in regard to its right to appeal the District Court's orders even if they were entered pursuant to § 2255 is to be found at pages 21-24 of its brief.

The Government contends (p. 22) that each petitioner "was granted all the relief he was entitled to ask when his sentence was set aside." This is tantamount to saying that Judge Murphy had no jurisdiction to order resentencing, that he exhausted his authority when he vacated the prior sentences, and that some new proceeding should have been initiated (the Government does not say what it might have been) looking toward eventual resentencing.

This is not the law and never has been. Petitioners sought and were granted the right to be resentenced, a direction by the Court that has yet to be carried out. Their motions, whether civil or criminal, cannot be viewed in a vacuum, detached like Ichabod's head from the criminal proceeding which brought them into being and which, as the Government concedes (p. 22), they reopened. The Court did not vacate petitioners' sentences, declare the proceedings closed, and set the petitioners on their way to obtain further relief in the original criminal case. The Court's orders, which bore the original *criminal* docket number, directed (1) that the sentences be set aside, and (2) that the petitioners be resentenced. If, as the Gov-

ernment says, the orders "terminated the authority of the United States," it is puzzling that petitioners were not granted bail pending the Government's appeal (R. 68, 73) and were not even given permission to come to the Second Circuit to prepare for the appeal (R. 62-63).

It is interesting in this regard that the Government does not choose to deal with such cases as *Collins* v. *Miller*, 252 U.S. 364 (1920), upon which petitioners relied (Brief for Petitioners, pp. 11, 20). For there, one of the habeas corpus orders was final, since it denied the writ and thus technically brought the proceeding to a close, and the other habeas corpus orders could also be considered "final" in the sense that Collins was remanded to the custody of a judge for further extradition hearings. This Court, however, refused to view the case in any such technical light but instead looked at all of the orders together and considered the true nature of what was done. And in any realistic sense, all of the orders were non-final, because the matter still had to be concluded. Hearings still had to be held and orders entered. And so here, too, Judge Murphy's orders, even if civil in nature, could be considered "final" only by the most strained, unrealistic and legalistic reasoning in an area where the Government's right to appeal should be restricted rather than broadened.

The Government says the petitioners have no interest in being resentenced. Quite to the contrary, every defendant serving a sentence—and particularly a mandatory sentence—is interested in being resentenced, and at the earliest possible moment. In the Federal system, unlike in most state systems, a sentence does not begin to run until the defendant is received at an institution for service of the sentence that has already been imposed. 18 U.S.C.A. § 3568 (Supp. 1962). When a defendant subsequently serves time, his sentence is vacated, and he is then resentenced, the

Court need not take into consideration the time he has already served. Although it is customarily the practice, of course, to award credit for such time by giving a shorter sentence on resentencing, there have been occasions when such credit has not been awarded. And in the case of a mandatory sentence, credit *cannot* be awarded; the only sentence that can be imposed is the mandatory minimum or a suspended sentence and probation. Judge Walsh avoided this dilemma in the instant case by allowing the original sentences to "remain unchanged and in full force and effect" rather than resentencing petitioners to 25 years (R. 33, 34), but there is no guarantee, of course, that this will always occur. The Attorney General is required by statute (18 U.S.C.A. § 3568 (Supp. 1962)) to give a prisoner credit for days spent in custody prior to imposition of sentence *for want of bail* where the sentence is a mandatory minimum, but this language has been interpreted by the Department of Justice not to apply to a case like the instant one where a sentence is vacated.[1] To date, the Department has given such credit as a matter of administrative discretion, but there is no legal guarantee, of course, that this practice will continue or will be applied in every case.

Thus, without expressing any view as to the legality of an attempted resentencing in which credit in one form or another is not given for time already served, we point out that every defendant obviously has a vital, immediate and basic interest in being resentenced after his prior sentence has been vacated, and resentenced at the earliest possible moment without the intervention of interlocutory Government appeals.

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[1] There have been moves to correct at least some phases of this anomaly. See, for example, Report of the Judicial Conference of the United States (1962), p. 35.

If, as the Government suggests (p. 23), it is "firmly established" that the Government may appeal the type of orders involved here, it is remarkable that the Government has not found a single case directly supporting such an appeal. Of the four cases cited in footnote 4, page 23, of the Government's brief, two (*Craig* and *Jung Ah Lung*) involved final orders discharging the petitioners from custody; one (*Ju Toy*) involved a final order declaring the petitioner to be a native-born citizen; and one (*Collins*), as pointed out above, held the orders to be interlocutory and non-appealable. The *Williamson* case, cited on page 24, also involved a final order (as pointed out on page 22 of the Brief for Petitioners), and in the *Bonner* case, cited on page 24 of the Government's brief, it was not even implied that an appeal would lie from the type of order issued by the Court. There is a serious question whether the *Kelly* case (p. 23) was correctly decided. But even if it was, it is easily distinguishable from the situation here, because in *Kelly* the judgment of conviction was vacated, a new trial was ordered, and the parties had to begin *ab initio*, as if nothing had gone before. Here, on the other hand, petitioners did not seek to have their judgments set aside, nor did Judge Murphy set the judgments aside. Petitioners stand today as convicted as they did the moment after the jury returned its verdict. Petitioners are not—in the words of § 2255—claiming in their motions "the right to be released," and the result of Judge Murphy's orders, as the Government concedes (p. 23), is to institute further proceedings in the original criminal case—namely, resentencing. *Kelly* was never cited by any court as standing for the proposition advanced by the Government here.

Thus, none of the cases cited by the Government stands for the proposition either that the orders here under re-

view are final[2] or that the Government can appeal from interlocutory orders under Rule 35 or § 2255. As pointed out in petitioners' brief, the precedents are to the contrary.

II.

Even If Final, the District Court's Orders Were Not Appealable Because They Were Part of the Criminal Case.

The Government does not argue that it had the right to appeal if Judge Murphy correctly granted motions under Rule 35. The Government does not dispute, in other words, that 18 U.S.C.A. § 3731 governs the Government's right to appeal in criminal cases, that motions under Rule 35 are part of the criminal case, and that § 3731 gave the Government no right of appeal in this case. Rather, the Government's position (pp. 8, 10, 15, 18, 19) is that the District Court had *no jurisdiction* to decide petitioners' motions as part of the criminal case. This argument is predicated on the theory that Rule 35 can be used only to attack a sentence which is illegal *on its face*. Three points should be noted in regard to this argument.

First, it is not supported by the language of Rule 35. That rule simply provides that "an illegal sentence" may be corrected at any time, and a sentence which cannot stand—which is in fact vacated—even though the judgment of conviction remains unaffected, must be an illegal sentence.

Second, the Government's argument is far broader than this Court was willing to go in *Heflin* v. *United States*,

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[2] Orders relating to criminal cases have been held non-appealable though having a far more "final" effect than the ones involved here. See, *e.g.*, *Flint* v. *United States*, D.C. Cir., Misc. No. 1387, filed December 3, 1959, and *Flint* v. *District Court*, D.C. Cir., Misc. No. 1388, filed December 3, 1959 (both unreported); *Mack* v. *United States*, 274 F.2d 582 (D.C. Cir.), *cert. denied*, 361 U.S. 916 (1959).

358 U.S. 415, 418, 422 (1959). In essence, the Court's position in that case was that Rule 35 is available to attack a sentence collaterally unless there must be a hearing to consider matters *outside the record*. Obviously, what this Court had in mind was that Rule 35 is available whenever the District Court, with the record before it, can decide the motion without holding a hearing. No hearing was necessary in this case. None was held. Judge Murphy decided the matter on the face of the record. Rule 35 clearly was the proper remedy.

Third, the Government's argument is inconsistent with its own position in other parts of its brief. For even the Government does not challenge the correctness of some cases in which Rule 35 has been used because defendants were absent at the sentencing procedure (see page 14 of the Government's brief). It attempts to distinguish those cases on the ground that the absence there was apparent from the face of the *judgment* (not, it should be noted, from the face of the *sentence*), whereas here it is apparent only from the face of the *record*. Surely this is a distinction without meaning. In neither case is a hearing necessary. In both cases the District Court has before it (as the Government itself stresses at page 18 of its brief) everything necessary to decide the motion. Neither reason nor necessity calls for such a distinction. Moreover, the argument that the legality of the sentence on its face ousts the District Court of jurisdiction conflicts with the Government's further statement (p. 20) that whether Rule 35 or § 2255 is the proper remedy depends upon "The content of the motion upon which the order is granted * * *, *i.e.*, the relief requested and the grounds given for demanding for relief." If this latter statement is true, the District Court must have jurisdiction to interpret the motion, even incorrectly, and to grant relief. As this Court stated in *Ladner* v. *United States*, 358 U.S. 169, 172-173 (1958),

after discussing cases under § 2255, habeas corpus and Rule 35: "The fact that the Court has so often reached the merits of the statutory construction issues in such proceedings suggests that the availability of a collateral remedy is not a jurisdictional question in the sense that, if not properly raised, this Court should nevertheless determine it *sua sponte*."

The Government suggests (pp. 14-15) that § 2255 did away with the necessity of using Rule 35, but at another point (p. 18) the Government concedes that § 2255 is not always available when Rule 35 is available. It seeks to overcome this hiatus by stating that § 2255 would become available "as soon as [the defendant's] term commenced," and that the denial of the right of allocution "would normally go to all counts." Even assuming that the defendant could wait until some future date for his motion to be acted upon, the Government ignores those cases in which the sentence has already been served[3] or in which the defendant is attacking a federal sentence while in custody under a state sentence.[4] In these cases there is either a remedy under Rule 35 or no remedy at all, even under the Government's theory.

Moreover, if motions such as those filed by petitioners were held to be § 2255 motions, a prisoner seeking to have his sentence vacated would have to pay a $15 filing fee or obtain formal permission to file *in forma pauperis*;[5] the Government, if it could appeal, would have a longer time within which to appeal;[6] the statutory provisions for bail

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[3] See Brief for Petitioners, p. 34 n. 27.

[4] See Brief for Petitioners, p. 34 n. 26.

[5] *Martin* v. *United States*, 273 F.2d 775, 777-778 (10th Cir. 1960), cert. den. 365 U.S. 853 (1961). See also Federal Court Clerks' News, Vol. 20, No. 5, pp. 5, 7-8.

[6] *Klink* v. *United States*, 308 F.2d 775 (10th Cir. 1962).

would not apply; no filing could be made unless the prisoner was actually serving his sentence; great confusion would ensue as to whether civil discovery rules are applicable, and the full record would not necessarily be made a part of the § 2255 proceeding or the § 2255 proceeding made a part of the criminal record.[10]

We submit that Judge Murphy did not lack jurisdiction to grant relief under Rule 35 and that the Government does not seriously think otherwise. For the Government conceded on the record (R. 48) that Judge Murphy granted relief "under Rule 35," and if the Government really thought Judge Murphy was acting wholly without jurisdiction, it would have sought mandamus rather than an appeal (see Brief for Petitioners, p. 28 n. 21).

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[8] See Brief for Petitioners, pp. 17-18; R. 74-73.

[9] See Brief for Petitioners, pp. 33-34, and *Grant* v. *United States*, 308 F.2d 728 (5th Cir. 1962).

[9a] *Cf. Fulwood* v. *Clemmer*, D.C.D.C., Civil Action No. 3211-61, filed January 17, 1962 (unreported).

[10] See Brief for Petitioners, p. 33.

III.

The District Court Was Correct in Ordering Resentencing.

The Government does not deny that "aggravating circumstances" during a sentencing procedure are grounds for a collateral attack upon a sentence.[11] But it says there were no such aggravating circumstances in this case.

(a) *The argument during the absence of the defendants and of one of the defense attorneys.*

The Government contends (pp. 27-30) that petitioners could not have been prejudiced by the argument held in their absence because the only subject discussed was whether two counts of the indictment merged. But the Government itself refutes this statement, because it says at page 5 of its brief that during the absence of the defendants, "Counsel [Mr. Friedman] also requested the court to grant the defendants some consideration for the time already spent in prison (R. 21-24)." The record shows, in fact, that half of Mr. Friedman's entire presentation during the absence of the defendants and of Mr. Healey was devoted to matters other than whether the first two counts merged (R. 23-24). Friedman referred, for example, to the time the defendants had already spent in prison, the reports in the possession of the Court dealing with the

[11] The First Circuit Court of Appeals has recently remanded the *Green* case which was before this Court at 365 U.S. 301 because of what it deemed aggravating circumstances. Following this Court's decision, Green filed a motion under § 2255 seeking, *inter alia*, an opportunity to show that he had not, in fact, been asked by the sentencing court whether he wished to speak, and to show further what he would have said had he been allowed to speak. The Court of Appeals held that he was entitled to show these facts. *Green v. United States*, No. 6026, decided January 23, 1963 (not yet reported). The "aggravating circumstances" consisted entirely of matters which Green wanted to tell the sentencing court and were thus far less aggravating than the circumstances in this case.

defendants' families and background, the limited means of the defendants' families, and the Court's prior disposition to grant less than mandatory sentences—all constituting an obvious appeal for probation and having nothing whatever to do with the merger of counts.

Moreover, the presentation of an argument during the absence of petitioners and Healey was fundamental error regardless of what was discussed, because those who were absent had no way of knowing what transpired—a vital omission with far-reaching consequences during the all-important moments before the Court decided what sentences were to be imposed.[12] One of the purposes of Rule 43 is to make Rule 32 (a) effective—that is, to allow a defendant to speak in the light of the facts that have been brought out not only at trial but at the sentencing procedure. The Rule 32 (a) right is largely meaningless if the defendant has not been present for all of what has gone before.

The Government says (p. 30) that the absence of Healey was not important because Friedman repeated his legal argument in Healey's presence, and because Friedman represented all three defendants. As pointed out above, Friedman made more than a legal argument in Healey's

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[12] See Brief for Petitioners, p. 41. Any attempted comparison of what occurred here with a conference at the bench or in judge's chambers is wholly fallacious. Such "private" conferences have a limited, even a questionable, role in criminal proceedings (*cf. Smith* v. *United States*, 238 F.2d 925, 930-931 (5th Cir. 1956), see also same case, 360 U.S. 1, 3, 17-18 (1959)), and many judges do not allow them at all. But even where they are allowed, they never deal with a matter as basic as the proper sentence to be imposed. The Fifth Amendment and Rule 43 could hardly mean that a sentence can be agreed upon by the judge and the attorneys in private, with the defendant called in merely for the pronouncement. The importance of the presence of a defendant during the sentencing procedure has recently been stressed in *Behrens* v. *United States*, 312 F.2d 223 (7th Cir. 1962).

absence—he made a plea for probation. And he did not even repeat his entire legal argument during Healey's presence. Nor is there any showing that Healey *knew* what was said during his absence. But most importantly, the points Friedman did make in Healey's presence were stated *after*, not before, the Court had imposed sentences (R. 30-33), so it was obviously too late for Healey to have his say.

The point in regard to which defendants Friedman represented is not free from doubt. Friedman told the Court during Healey's absence that he represented all three defendants, even though they were differently situated (R. 20, 23). But it is to be noted that the docket entry showed that he appeared only on behalf of Andrews and Cohen, and that Healey appeared on behalf of Donovan (R. 20), and the judgments entered by the Court showed that Friedman appeared for Andrews, and Healey for Donovan (R. 33, 34). In any event, Donovan apparently had reasons of his own for retaining Healey as his counsel, and whether Healey appeared in addition to or in place of Friedman, he was entitled to be present.

(b) *The Court's misconception of the facts.*

The Government quotes language which purports to show that the Court was told, and understood, that Andrews was not on the truck at the time of the holdup (pp. 31-34). We submit that the quoted material not only fails to show the true facts but may have helped to mislead the Court.[13]

The first quotation, on page 31, states that Donovan attempted the holdup with a revolver and that Andrews "planned and helped execute the holdup," a phrase that

[13] A trial court's "misreading of the record" just prior to sentencing was one ground for granting a writ of habeas corpus in *Townsend* v. *Burke*, 334 U.S. 736 (1948).

could easily have misled the Court as to the part played by Andrews. The quotation on page 32 never mentions Andrews and therefore could hardly have made his role clear to the Court. The quotations of the Court at page 33 reinforce rather than dispel the notion that the Court misunderstood Andrews' role, for Andrews did not "carry out the crime" any more than Cohen did, nor had he "committed the holdup" any more than Cohen had, and he certainly was not "on the truck."

The Government's evidence in this case, if believed, showed that Cohen himself was in the vicinity of the holdup immediately prior to the crime (Original Transcript on file with the Court, pp. 111-112), that Andrews left the immediate scene of the crime *before* Donovan even got into the mail truck, and that Andrews was arrested, unarmed, a full block away from the crime. (Original Transcript, pp. 191-193, 252-256, 307-313, particularly p. 311. See also Original Transcript, pp. 80-84, 90-93, 106-107, 121-122, 146-147, 158-159, 167-171, 325-336, 339-340, 345.)[14]

(c) *The defendants clearly were not allowed to speak in their own behalf.*

The Government does not claim that any question was directed by the Court to the defendants themselves and does not dispute the fact that the version of the sentencing procedure given by the Court of Appeals was inaccurate. The Government contents itself with the proposition that "every extenuating circumstance known to the petitioners was brought forward by their attorneys" (p. 26)—a wholly

[14] Certainly any reliance upon the presentence report for the facts is misdirected (Government's Brief p. 32), because we do not know what was in that report. It could even have been the source of the Court's confusion.

gratuitous assumption which can only be tested by allowing petitioners to have their say. It should be noted that Rule 32 (a) is unequivocal; it does not provide that a defendant is to be allowed to speak only when his attorney fails to speak. Moreover, Rule 32 (a) grants a defendant two rights: to make a statement in his own behalf, and to present information in mitigation of punishment. Even assuming that an attorney could supply the information in mitigation of punishment, the right to speak in one's own behalf, by the nature of things, is personal to the defendant. See *Green v. United States*, 365 U.S. 301, 304, 307 (1961). Here, that right was clearly denied.

(d) *Other aggravating circumstances.*

The Government does not dispute that Donovan had a record, so that it was particularly important for him to speak, and on the subject of the failure to grant the right of allocution at the initial sentencing in 1954, the Government contends that this had nothing whatever to do with the violation in 1957 (p. 27 n. 5). On this latter point, it should be noted that Judge Walsh could not have had the advantage of a presentence report at the initial sentencing, since the sentencing took place immediately following the jury verdict (Appendix B of Petitioners' Brief), despite the requirement of Rule 32 (c) (1) that such a report be made to the court prior to sentencing. Therefore, although petitioners were theoretically "resentenced" in 1957, they obviously were disadvantaged by the fact that 25-year sentences had been outstanding against them for two and a half years before any presentence report was ever made, and Judge Walsh allowed the original sentences to "remain unchanged and in full force and effect" (R. 33, 34). Certainly it is relevant that to this day—more than eight years after the initial sentencing—petitioners

have yet to say their first word in mitigation of sentence or on their own behalf.[15]

Conclusion

Without so much as a mention of such cases as *Stack* v. *Boyle*, 342 U.S. 1 (1951); *Carroll* v. *United States*, 354 U.S. 394 (1957), and *DiBella* v. *United States*, 369 U.S. 121 (1962), the Government is asking the Court to carve out another exception to the rule that the Government may not take interlocutory appeals from orders which are essentially and in practical effect a part of a criminal proceeding. Nor has the Government given the Court any reason why such an exception is necessary. The Administrative Office of the United States Courts informs counsel for petitioners that of the almost 600 motions to vacate sentences disposed of by the United States District Courts during fiscal 1962 under Rule 35 *and* § 2255, only 18 resulted in the granting of some form of relief. Surely the fair administration of justice does not require interlocutory review of these few cases. On the contrary, in view of the fact that an interlocutory review in many cases defeats the very right which

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[15] The Government refers to the fact (p. 26) that until their present appeal, petitioners made no reference on appeal to the circumstances surrounding their resentencing. This is easily explained by the fact that heretofore petitioners have always been represented on appeal by one or more of the same attorneys who represented them at the original sentencing and at the resentencing and who had either taken part in, or had failed to object to, the various aggravating circumstances about which petitioners complain. See 242 F.2d at 62; 252 F.2d at 788; 263 F.2d at 608. Apparently petitioners did not know until this Court decided *Green* v. *United States*, 365 U.S. 301 (1961) that they were entitled to a right which had been denied them, because their motions were filed within a few months after that decision was rendered.

Rule 35 and § 2255 seek to protect, the fair administration of justice demands that Government appeals in these cases be denied.

Respectfully submitted,

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Appointed by the Court